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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1170

FLETCHER H. HANSON, et al,

Petitioner,

Vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ROBERT O. ELLIS, JR.
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Huntington, West Virginia, 25701

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioners, Fletcher H. Hanson, William H. Henderson, Oshel C. Scragg, Harrison Bradshaw, Arthur Lee Masterson, Clarence E. Cyrus, Denver Bowman, Earl Scragg, Milford Maynard, C. B. Taylor, Alderson W. Mills, Elbert Keesee, Martin Prince, James H. Napier, Warren S. Mellert, and Okey Farley, respectfully pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on November 4th, 1965.

OPINIONS BELOW

The District Court rendered an opinion, which is reported at 236 F. Supp. 56 and is reprinted in the Appendix, Section Three, p. 1a - 15a, *infra,* order entered, January 20, 1965.

The Opinion of the Court of Appeals is reported at ..... F. 2d, ... and is reprinted in the Appendix, Section Five, p. 1c, *infra,* order entered, November 4, 1965.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed and the time of its entry is November 4, 1965. (Appendix, Section Five, p. 1c, *infra*).

2. On January 20, 1966, an order was entered by this Court extending the time within which to file a petition for certiorari to and including April 3, 1966. (Appendix, Section Six, p. 1d, *infra*).

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC § 1254 (1).

QUESTION PRESENTED

This action under 45 USC, Section 153 (m) and (p), was originally brought to enforce an Award and Order of the National Railroad Adjustment Board. The District Court, on motion of Respondent for summary judgment, determined the Award was erroneous in that the Board misinterpreted the rules of the bargaining agreement and misapplied the law thereto. It therefore concluded that under a

correct interpretation of the agreement there was no violation of its terms by the railroad, and this being so, the Petitioners had no cause of action.

THE QUESTION PRESENTED, as in *Gunther v. San Diego & Arizona Eastern Railway Co.*,—US—, 15 L ed 2d 308, 86 S. Ct. ..... ; is whether this summary rejection of Petitioner's suit, based on said Award and Order, is consistent with the presumptive validity conferred upon such awards by Sections 153 (m) and (p) of the Railway Labor Act, the comprehensive statutory scheme for amicable adjustment of disputes between carriers by rail and their employees, and the decisions of this Court which require railroad workers, in seeking enforcement of their contractual rights to abstain from violent economic action and to place their entire reliance on the Board and, if its award is favorable, the federal judiciary.

STATUTES INVOLVED

The statutory provisions involved are Sections 1-9 of the Railway Labor Act, 45 U.S.C., Sections 151-156. Pertinent provisions of Section 3 (45 U.S.C., Section 153) are printed in Appendix, Section Two.

STATEMENT OF CASE

On July 15, 1955, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees filed a claim against the railway company stating that the collective bargaining agreement they had with it had been breached by the company in abolishing positions at Huntington. Union and management were unable to settle the dispute so the brotherhood filed its claim with the

National Railroad Adjustment Board's Third Division: (App. Section Two).

The undisputed facts in this case briefly summarized reveal the following: During the months of March and April, 1955, the Chesapeake and Ohio Railway Company changed its schedule covering package cars of less-than-carload freight whereby freight, which previously had been billed to Huntington, West Virginia, for unloading and transferring into other railway cars for further shipping, was under this new schedule to be billed to Ashland, Kentucky. The Huntington and Ashland stations are about sixteen miles apart and are in diferent seniority districts. As a result of this increase in bulk-transfer work at Ashland, nine new positions were established there. At the same time, due to the decrease of work at Huntington, the railway company abolished twenty-three positions there (ten clerical (Group 1) and thirteen labor (Group 3).)

At the initial hearing the Board was deadlocked. A referee under section 45 U.S.C. § 153 was provided: (App. Section Two).

After due consideration the Board ruled (5-4) that there had been a violation of the collective bargaining agreement by the Carrier in that it did, without consultation of the Brotherhood, cause work to be moved out of one seniority district and into another.

Award 9193 was the result (See App. Section One for actual reproduction of the Award pp 1-36).

The opinion of the Board in part held: " . . . These changes were accomplished unilaterally by Carrier without consultation with the Brotherhood. The

Huntington employes affected were not afforded an opportunity to follow their work to Ashland (without suffering their loss of seniority rights) . . . (Parenthesis added) . . . the changes under consideration amounted to a removal of the work out of one seniority district and into another . . . There is no doubt but that the realistic and inevitable result of the changes, however, they were accomplished, was to cause employes within the Huntington seniority district to lose work they had been performing to employes in another and entirely separate seniority district."

This in effect held that the Carriers (Railroad) had violated the cotrolling agreement, notably Sections (c), (d), (e) and (f) thereof, (App., Section One, p. 5) which provide that Ashland and Huntington are separate seniority districts that are not to be changed in the absence of agreement between the contract parties. Those sections considered together with Rlues 1 (a) and (b) (Appendix, Section One, p. 3) Rule 3—Seniority (Appendix, Section One, p. 4), and Rule 17 (e) (Appendix, Section One, p. 6).

Finally the Board stated, "In reaching this conclusion . . . (that the agreement was violated) . . . we have considered the Agreement before us and not the equities of the situation. In our view, this requirement is basic and fundamental to the seniority rights prescribed by that Agreement. There is nothing in the requirement that is harsh, unreasonable or inconsistent with the duties and privileges of a Carrier.

The claims therefore sustained were as follows:

(a) That the Carrier violated and continues to violate the Clerical Agreement when begin-

ning on or about April 12, 1955, it did without conference or agreement arbitrarily and unilaterally remove work from the Huntington, West Virginia seniority district and transfer same to the Ashland, Kentucky seniority district and place it at Ashland, Kentucky, and

(b) That each and every employe whose position was nominally abolished, other employes at interest who in any way suffered wage loss or were adversely affected through the arbitrary action of the Carrier in disregarding their seniority rights and removing their work to another seniority district and denying them the right to follow such work be compensated for any and all loss or adverse effect retroactive to the date on which the violation occurred. Claim to continue until correction is made.

The railroad, apparently admitting to the violation, paid a number of various employees divers amounts without explaination as to computation or selection.

At no time did the railroad comply with 45 USC § 153 (m) requesting an interpretation of the award in the light of a dispute.

In time a group of employees who felt affected by the violation, brought a petition under 45 U.S.C. § 153, First (m) and (p) (Appendix three, Section two) to enforce the order of the National Railroad Adjustment Board, Third Division. There are sixteen petitioners and the total amount claimed is $200,000 plus reasonable attorney's fees for petitioners' attorneys.

A motion filed by Respondent Railroad, Carrier herein, to dismiss the petition because the "Award" of the Board was too vague, indefinite and incom-

plete to be judicially enforced was dismissed by order of Harry E. Watkins, District Judge for the United States District Court for the Southern District of West Virginia. Opinion reported in 198 F. Supp. 325 (S. D. W. VA. 1961).

Thus what the railroad should have requested under Section 153 (m), it attempted to oust by judicial means in direct contradiction to this Court's construction of the Statute.

Judge Watkins, in his decision, *supra,* acknowledging the Congressional intent of the Statute held in part: "Just as in any other civil case, the plaintiffs here (Hanson et al) will have to prove that they are within the class of persons entitled (under the Award) to recover and that they have sustained damages. And, just as in any other civil case, if their proof fails, so will they." (Parenthesis added)

Subsequently the Respondent Railroad filed a motion for summary judgment in July, 1962 and as grounds for such motion Respondent Railroad alleged that the Board's decision was erroneous in holding there had been a violation of the collective bargaining agreement and it was unenforceable as a matter of law.

Thereafter, in October, 1962, Petitioners filed their motion for summary judgment upon the ground the pleadings and subsequent instruments filed with the Court showed the Petitioners were entitled to judgment as a matter of law. The Petitioners wanted only to appear, and prove their individual cases as granted them under Section 153 (p).

Judge Sidney L. Christie, newly appointed to the Bench for the United States District Court for the

Northern and Southern Districts of West Virginia, replacing the late Harry E. Watkins, awarded the Respondent Railroad the motion for summary judgment and denied Petitioners' motion for summary judgment to enforce Award No. 9123 of the Third Division of the National Railroad Adjustment Board. Such order and opinion appear at 236 F. Supp., 56 and is reprinted in the Appendix, Section Three, p. 1a, infra. The decision, in effect, held that the Board misinterpreted the rules of the bargaining agreement and missapplied the law thereto.

The Petitioners timely filed their appeal to the Court of Appeals, Fourth District, who on November 4, 1965, affirmed the lower court's decision. (Approximately one month prior to this Court's opinion in the *Gunther Case*).

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

What is truly the impact of the decisions below upon all of the employees of the railroads throughout our land and to the public in general? If the trend is followed that each Award interpreting a collective bargaining agreement is to be subjected to judicial scrutiny, then what is the purpose of having the National Railroad Adjustment Board? The issues before this Court then become of great importance involving the railroad labor forces and the public in general.

Viewed in this manner, there is little doubt the decisions below in this case involve a good deal more than deprivation of a small group of railroad workers' rights under the Railway Labor Act. The decisions are clearly in direct conflict — basically a

refusal — by the District Court and the Court of Appeals to "take the findings of these divisions of the Railroad Adjustment Board as they come and do what they can with them." *Kirby v. Pennsylvania R. Co.* (3rd Cir. 1951) 188 F. 2d 793, 796, particularly when " . . . such an Award by National Railroad Adjustment Board carriers a presumption of validity." *Parker v. Illinois Cent. Ry. Co.*, (D.C. Ill., 1952) 108 F. Supp. 186.

Writ of Certiorari was granted by this Court in *Gunther v. San Diego & Arizona E. R. Co.* 380 US 905, 13 L ed 2d 793, 85 S Ct 890, because the holdings of the two courts below seemed, in several respects, to run counter to the requirements of the Railway Labor Act as this Court has construed it. Basically the questions of interpretation of collective bargaining agreements in the *Gunther* case are quite similar as presently appear before the Court.

There is little doubt a great conflict exists in the lower courts. The Court of Appeals of the Fourth Circuit in *Brotherhood of Railway and Steamship Clerks etc. v. Atlantic Coast Line Railroad Company,* 253 F. 2d 753 (1958), stated of the enforcement actions under 45 U.S.C.A. 153 First (p): "We find no basis for the contention that the order of the Board is binding upon the District Court." There the District Court had granted summary judgment to the railroad, just as in the instant action, denying enforcement of the NRAB Third Division referee's award. The opinion observed that in the earlier case of *Atlantic Coast Line R. Co., v. Brotherhood of Ry. & S. S. Clerks, etc.,* (4 Cir., 1954), 210 F. 2d 812 the Court of Appeals had reversed a District Court order granting enforcement to a NRAB award.

Washington Terminal Co. v. Boswell, (1941) 75 U.S. App. D.C. 1, 124 F. 2d 235 affirmed by an equally divided court 319 U.S. 732, 63 S.Ct. 1430, 87 L. Ed. 1694 and *Dahlberg v. Pittsburgh & L. E. R. Co.,* (3 Cir.) (1953) 138 F. 2d 121 pointed out that since the Board is not a governmental agency, but is made up of persons paid by and employed to represent, in equal number, the employees and carriers, Congress had chosen not to vest NRAB money awards with finality. The trial *de novo* feature of enforcement actions was acknowledged in *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.* (1963), 373 U.S. 33, 41, 83 S. Ct. 1059, 10 L.Ed. 2d 172: "This, then, is clearly a controversy concerning a 'money award', as to which decisions of the Adjustment Board are not final and binding."

In asserting its precedence in the business of ascertaining what are the rights and duties of employer and employee as established by the *sui generis* method of collective bargaining in the railroad industry, the Court of Appeals has disregarded the "expertise" (*Elgin, J. & E. Ry. Co. v. Burley* (1946) 327 U.S. 661, 664, 66 St. Ct. 721) of the Board in this field of endeavor, and the prima facie value, or presumptive validity, of the work of the Board. The inconsistency, in principle, between the Court of Appeal's decision herein and the rationale underlying this Court's decision in *Elgin, supra,* and that of the Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell* is apparent. In *Washington Terminal* the late Justice Rutledge described the substantive effect of Adjustment Board awards as follows:

> "The statute also relieves the employee of another burden. It provides that the enforcement

suit 'shall proceed in all respects as other civil suits, except that on the trial . . . the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated.' 45 U.S.C.A. § 153, First (p). The burden of proof, in making a prima facie case may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order of evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of t h e i r collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony." (*Washington Terminal Co. vs. Boswell* (D.C. Cir. 1941) 124 F. 2d 235-241,

affirmed by equally divided court, 319 U.S. 732, 63 S. Ct. 1430).

See also, *Hanson v. Chesapeake & Ohio Ry. Co.* (D.C. W. Va. 1961) 198 F. Supp. 325; *Russ v. Southern Ry. Co.* (E.D. Tenn. 1963) 218 F. Supp. 634.

The decision of the Court of Appeals herein, like those of the District Court, demonstrates judicial inability to recognize the distinctive nature of agreements resulting from the collective bargaining process.

Custom and practice does provide evidence of contractual obligations and rights. In *Order of Railway Conductors v. Pitney* (1946) 326 U.S. 561, 66 S. Ct. 322, 325, this Court has noted the importance of evidence as to usage, practice and custom as follows:

> "For O.R.C.'s agreements with the railroad must be read in the lift of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to g i v e that agency the first opportunity to pass on the issue."

Under 45 USC, Section 159 a Board similar to the National Labor Relations Board has been provided by Congress in the Railway Labor Act. District Judge Holtzoff *In Re Certain Carriers Rep. by E., W. & S. E. Car. Conf. Com.* (DC, DC. 1966) 248 F. Supp. 1008 held: "The scope of judicial review of an arbitration.

award under the Railway Labor Act is narrowly limited and restricted." . . . "It must be borne in mind that this Court m a y n o t review the question of whether there was substantial evidence to support the awards of the individual special boards." . . . "The scope of judicial review under the Railway Labor Act is much narrower than that in respect to decisions of administrative agencies generally, as has already been shown." . . . "The question before this Court is, of course, not what this Court would have held in each individual instance on a trial *de novo* . . . it is merely whether . . . (the Board) . . . exceeded its power, committed some error of law, or acted arbitrarily or capriciously,"

Thus Judge Holtzoff held that the District Court is not vested with any authority by Railway Labor Act to examine evidence in preceeding before railway arbitration board or to determine whether findings of board are sustained by substantial evidence; board is clothed with plenary and final power to determine controversy provided it adheres to requirements of law. Railway Labor Act, § 9, subd. 3 U.S.C.A. § 159, subd. 3. The same is certainly true under Sections 159 (m) and (p).

If the case at bar signified only a failure by the courts below to heed the established rule prohibiting summary judgment unless the record makes it crystal clear that there are no factual issues for trial, this petition would not have been filed. It signifies much more than that. It constitutes precedent which is in conflict in principle, with the authorities cited above which, by giving full credit to the language of 45 U.S.C., Section 153 (p) of the Railway Labor Act—"The finding and order of the division of the Ad-

justment Board shall be prima facie evidence of the facts therein stated"—would seem to preclude dismissal of a petition to enforce a final award of the Board on motion for summary judgment.

Additionally, the decision of the courts below in this case conflicts, in principle, with the decision of the Third Circuit in *Kirby v. Pennsylvania R. Co.* (1951 supra, 188 F. 2d 793, the recent decision of the Fifth Circuit in *Hodges v. Atlantic Coast R. Co.* (1962) 310 F. 2d 438, and the most recent decision of this Court in *Gunther v. San Diego & Arizona E. R. Co.*, supra.

In all of these decisions there is recognition by the Court of Appeals that the role of the federal judiciary in entertaining petitions to enforce Adjustment Board awards is to assume a realistic approach to the work of the Board, to recognize the presumptive validity of the Board's findings as to what the collective bargaining process has established as being the contractual rights and duties of the parties, and to suppress the judicial tendency to minimize the fact finding capacities of an administrative tribunal.

The lower court's decision in this case is out of step with recent decisions of this Court which enlarge the credit to be accorded to the role of the arbitration tribunal in the disposition of claims arising out of collective bargaining agreements and profoundly limit the remedies of railroad workers who assert claims of contract violation against their employers.

There is a close analogy between the role of the Adjustment Board in determining disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules

or working conditions" (45 U.S.C., section 153(i), and that of an arbitration tribunal acting pursuant to a collective bargaining agreement provision like those involved in the cases commonly referred to as the Steelworkers trilogy. (*United Steelworkers of Amer. v. American Mfg. Co.* (1960) 363 U.S. 564, 80 S. Ct. 1343, *United Steelworkers of Amer. v. Warrior & Gulf N. Co.* (1960) 363 U.S. 574, 80 S. Ct. 1347, and *United Steelworkers of Amer. v. Enterprise W. & C. Corp.*, 363 U.S. 593, 80 S.Ct. 1358) These authorities stand for the general proposition that the public interest in orderly adjustment of differences between industrial employers and their employees is best served by judicial recognition of the jurisdiction of the instrumentalities established for the specific purpose of adjusting and arbitrating such differences.

Thus, in the *American Mfg. Co.* case this Court said—"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, *or determining whether there is particular language in the written instrument which will support the claim.* (363 U.S. 564, 568, 80 S.Ct. 1343, 1346, emphasis added) And, in the *Warrior & Gulf* case there was agreement with the observation that "It is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, *express* restrictions of its otherwise absolute right to manage the enterprise, *so that an employee's claim must fail unless he can point to a specific contract provision* upon which the claim is founded. * * * Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop *which im-*

plements and furnishes the context of the agreement." (363 U.S. 574, 579, 580, 80 S. Ct. 1347, 1351, emphasis added)

In the *Gunther* case, so heavily relied upon by the Respondent in it's brief to the Court of Appeals in this case; now reversed and remanded, this Court's very straightforward opinion concerning seniority rights and collective bargaining agreement follows:

> Section 3 First (i) of the Railway Labor Act provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements" are to be handled by the Adjustment Board. In § 3 Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day-to-day in the railroad industry. The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices. See *Slocum v. Deleware L. & W. Ry. Co.*, 339 U.S. 239, 243-244, 94 L ed 795, 799, 800, 70 S. Ct. 577. The Board's decision here fairly read shows that it construed the collective bargaining provisions which secured seniority rights, together with other provisions of the contract, as justifying an interpretation of the contract . . . the District Court, whose opinion was affirmed by the Court of Appeals, however, refused to accept the Board's interpretation of this contract. Paying strict attention only to the bare words of the contract and invoking old

> common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. *We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement.* As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field. (Emphasis added)

Finally, the question of the interpretation of the award so given the Petitioners by the National Labor Relations Board as it may relate to "money matters" is further taken into consideration in the *Gunther* case, supra.

Basically this Court held: That the Railway Labor Act (45 USC § 153 First (m), providing that awards of the . . . "Railroad Adjustment Board shall be final and binding upon both parties to the dispute, except insofar as they contain a money award, a determination of the Board on the merits of a grievance, such as a determination that a railroad employee was wrongfully removed from service, is not reviewable

by a federal court merely because a part of the Board's award is a money award."

And it further held in the same case that "Although a Federal District Court must accept the finding of the Railroad Adjustment Board on the merits of the wrongful discharge of an employee, the court has power under § 3 First (m) of the Railway Labor Act (45 USC § 153 First (m) to determine the size of a money award and, in particular, the time lost by reason of the employee's wrongful removal, and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost; in deciding the latter issue, the court will consider any change which has occurred in connection with the employee's health.

THEREFORE, because of the continued injustice and failure of the lower courts to follow the Congressional intent of the Railway Labor Act, as above cited, the questions presented in this case are of the utmost importance to the finality of future awards of the National Railroad Adjustment Board. The past decisions of the lower courts will invite the railroads to judicially question every Award favorable decided for the employee. Time consumed by these already busy courts, hearing such railway award cases, could be better spent on issues of merit. The existing conflict of the lower courts has become conflict "in principal" and not conflict in "decision!"

The Railway Labor Act was designed by Congress with the full intent it would subside the every increasing case load upon our courts, and would further provide a quick and economical procedure for a highly specialized industry to hear and arbitrate their own intricate problems. The past trend of the

lower courts has become one of "factual interpretations or situations" and one that certainly calls for the exercise of this Court's able supervisory powers.

The decision by this Court that the National Railroad Adjustment Board's awards are to be accepted by the District Courts in no way will prohibit the Respondent from appearing in its own behalf at the civil suit which will decide whether the Petitioners are entitled to the money award in the form of damages. This is principally a trial by jury, and protects the jury system as stated in *Dimick v. Schiedt*, 293 U.S. 474, 486,

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

It is respectfully submitted the following be considered:

1. The Railroad Adjustment Board, established under § 3 First (i) of the Railway Labor Act (45 USC § 153 First (i) has broad powers to settle minor grievances which arise from day-to-day in the railroad industry, such as a controversy resulting from an interpretation of the collective bargaining agreement under which both the employees and the railroad negotiated rates of pay, seniority rights, rules, and working conditions.

2. A federal court goes beyond its province in rejecting the interpretation given by the Railroad Adjustment Board to a collective bargaining agreement where the railroad failed to consult the appropriate bargaining representative of the employees

before making changes in shifting work out of one seniority district and into another, to the obvious detriment of one group of employees.

3. The Railroad Adjustment Board did not exceed its powers in holding that a railroad violated the collective bargaining agreement where the railroad attempted to do indirectly what it could not do directly, i. e., shift work from one seniority district to another to the obvious detriment of one group of employees, without first consulting the appropriate bargaining representative of the employees, as so provided in the agreement.

This Court has already held in *Gunther*, supra,

4. Under § 3 First (m) of the Railway Labor Act (45 USC § 153 First (m)), providing that awards of the Railroad Adjustment Board shall be final and binding upon both parties to the dispute, except insofar as they contain a money award, a determination of the Board on the merits of a grievance, such as a determination that a railroad employee was wrongfully removed from service, is not reviewable by a federal court merely because the Board's award is a money award.

5. Although a Federal District Court must accept the finding of the Railroad Adjustment Board on the merits of the wrongful discharge of an employee, the court has power under § 3 First (m) of the Railway Labor Act (45 USC § 153 First (m)) to determine the size of a money award and, in particular, the time lost by reason of the employee's wrongful removal, and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost; in deciding the latter

issue, the court will consider any change which has occurred in connection with the employee's health.

CONCLUSION

For the foregoing reasons Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

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321 Eighth Street
Huntington, West Virginia

Dated, March 23, 1966

(APPENDICES FOLLOW)

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APPENDIX

Section One

(Actual Reproduction)

Award No. 9193

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

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Award No. 9193
Docket No. CL-8754

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) That the Carrier violated and continues to violate the Clerical Agreement when beginning on or about April 12, 1955, it did without conference or agreement arbitrarily and unilaterally remove work from the Huntington, West Virginia seniority district and transfer same to the Ashland, Kentucky seniority district and place it at Ashland, Kentucky, and

(b) That each and every employe whose position was nominally abolished, other employes at interest who in any way suffered wage loss or were adversely affected through the arbitrary action of the Carrier in disregarding their seniority rights and removing their work to another seniority district and denying them the right to follow such work be compensated for any and all loss or adverse effect retroactive to the date on which the violation occurred. Claim to continue until correction is made.

EMPLOYES' STATEMENT OF FACTS: In the early spring of 1955, the Carrier lengthened some of its six existing tracts at its Ashland, Kentucky, less-carload freight transfer and also constructed a new seventh track. The effect of the additions and betterments made was to increase the car capacity of the facility from 57 to 83.

Beginning April 3, 1955, and continuing to June 2, 1955, the Carrier abolished ten clerical (Group 1) and thirteen trucker, cooper and stower (Group 3) positions at its Huntington, West Virginia transfer (Employes' Exhibit "H").

Beginning March 1, 1955, and continuing to May 3, 1955, the Carrier established four clerical (Group 1) positions and five trucker and stower positions at Ashland transfer (Employes' Exhibit "C"—page 2).

Beginning on or about April 12, 1955, the following work of checking, unloading, and transferring less-than-carload freight, formerly done by employes at Huntington, West Virginia, began to be done at Ashland, Kentucky:

Origin	Carrier
Chattanooga, Tenn.	Sou.
Parkersburg, W. Va.	B&O
Huntington, W. Va.	B&O
Detroit, Mich.	C&O
Grand Rapids, Mich.	PM
Johnson City, Tenn.	CRR
Kenova, W. Va.	C&O
Mullins, W. Va.	Vgn.
New York, N. Y.	PRR
Portsmouth, Ohio	N&W
Waynesboro, Va.	C&O

What Carrier did was to gradually divert cars loaded to "break bulk" at Huntington to the Ashland transfer, or as the Carrier phrased it: changed its car lines. Positions doing the work at Huntington were abolished and the work in part done by employes already occupying established positions at Ashland, and in part by the occupants of the new positions established at that point. No agreement was had or sought with the General Committee. Nor were the employes adversely affected afforded an opportunity to follow their work to Ashland.

Huntington, West Virginia, is in the Huntington seniority district, while Ashland, Kentucky, is in the Ashland-Big Sandy seniority district.

Claim was filed July 15, 1955, and appealed up to the Carrier's highest officer designated for that purpose. Conferences were held on August 10, 1955, and November 14, 1955, the Carrier declining the claim.

Correspondence in connection with the claim is attached hereto and identified as Employes' Exhibits "A" through "F."

A memorandum of conference held on August 10, 1955, is attached hereto, and identified as Employes' Exhibit "G". The agreed facts show the positions abolished at Huntington "due to no longer handling transfer freight at Huntington Freight Station."

A statement showing title of the abolished positions, position numbers, name of incumbent, wage rate, and date abolished is attached hereto and identified as Employes' Exhibit "H".

POSITION OF EMPLOYES: There is in effect an agreement between the parties bearing effective date of January 1, 1945, amended and supplemented effective on various dates subsequent thereto. A copy of the Agreement is on file with your Division and is by reference made a part of this Submission. Certain rules or portions thereof will be quoted from the Agreement for ready reference and in support of the claim:

"Rule 1 — Scope

"(a) These rules shall govern the hours of service and working conditions of all the following class of employes:

"Group 1—Clerical Workers: Employes who regularly devote not less than 4 hours per day to the compiling, writing, and/or calculating incident to keeping records and accounts, transcribing and writing letters, rendition of bills, reports, statements, handling of correspondence, checking baggage, freight and material, and similar work, and to the operation of office or station mechanical equipment requiring special skill and training such as typewriters, calculating machines, adding machines, bookkeeping machines, tabulating machines, accounting and timekeeping machines, statistical machines, dictaphones, key punch, recordak, and photostat machines, teletype (except teletypes used exclusively in the transmission of messages and reports and located in offices which are equipped with telegraph facilities), and other similar equipment or devices used in the performance of clerical work or in lieu thereof. Also station, store and warehouse general foremen and assistant general foremen; station, store, warehouse and merchandise pier foremen and assistant foremen; at Newport News, Virginia, top and bottom coal pier foremen and assistants, and sprinkler foremen; pursers and assistant pursers, chief clerks, assistant chief clerks, ticket sellers, managers of Zone Revision Bureaus, division storekeepers, stationery storekeeper, car distributors, traveling timekeeping accountants, assistant boatmasters, city ticket agents, assistant city ticket agents, service inspectors-Passenger Transportation Department, supervisors and assistant supervisors of the clerical craft or class, stationmasters and assistant stationmasters.

"Group 2—All other office, station, and store employes such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employes (other than Group 1 and Group 3), train and engine crew callers, operators of certain office or station devices not requiring special skill or training, office, station, store, and warehouse watchmen, telephone switchboard operators, employes assorting tickets or waybills, and others performing similar work.

"Group 3—Laborers employed in and around offices, stations, storehouses, warehouses, and Newport News-Norfolk Steamer including scrap dock laborers (Stores Department), and those used to adjust overloads and/or transfer bad order loads at freight stations and where it has been the practice to use employes covered by this Agreement, porters, and matrons.

"(b) Positions within the scope of this Agreement belong to employes herein covered and nothing in this Agreement shall be constructed to permit the removal of such positions from the application of these rules except as provided in Rule 65.

"* * * * *"

"Rule 2 — Exercising Seniority — New Positions and Vacancies

"(a) Seniority rights of employes covered by this Agreement may be exercised only in cases of vacancies, new positions or reduction in force, except as otherwise provided in this Agreement.

"(b) Seniority rights of employes to vacancies, new positions or in exercising displacement rights will be governed by these rules, and in exercising such seniority rights, Rules 4 and 9 will apply."

"Rule 3 — Seniority

"(a) Seniority is established and its exercise allowed as provided by the terms of this Agreement. Seniority established hereunder is to be retained by the employe subject to the terms of this Agreement while same remains in effect. The two parties signatory hereto have full authority to jointly reach a mutual, definite and final conclusion on any question affecting seniority held under this Agreement.

"(b) Except as provided in Section (c) of this rule * * *, employes entering the service do not establish seniority until awarded a rank and file bulletined position, that is, a bulletin for a new position, permanent vacancy, or temporary position or vacancy of 30 calendar days or more duration. Seniority will begin on the date the employe actually performs service on such bulletined position, subject to the provision of Rule 25.

"(c) Subject to the provisions of Rule 25, Group 3 employes entering the service will establish seniority on the date they are assigned a new position, permanent or temporary vacancy, of 30 calendar days or more duration; except Group 3 employes entering the service used for extra service for 6 consecutive months will establish seniority on the roster in the department in which they perform extra service from date of first service during the 6 months' period.

"* * * * *"

"Rule 4 — Promotion, Assignments, and Displacements

"Employes covered by this Agreement shall be in line for promotion. Promotion, assignments, and exercising displacement rights shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

"Note: The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

"Rule 6 — Seniority Districts — Other

Than General Office

"(a) Seniority rights of employes in their respective groups in bidding on bulletined positions, and of Group 3 employes in applying for Group 3 new positions or vacancies, will apply as follows:

"First—To all employes on the roster in the department where the vacancy or new position exists on the seniority district.

"Second—To all employes in all departments on the seniority district.

"* * * * *

"(c) Seniority districts shall not be changed except by mutual agreement between the representatives of the parties hereto.

"(d) Where Group 1, 2 and 3 work is performed in the various departments referred to herein, separate rosters will be maintained for each group.

"(e) Any change in the established rosters must be made by agreement of the parties hereto.

"(f) Seniority districts as referred to in this rule are as follows:

"* * * * *

"HUNTINGTON DISTRICT:

"West of Morris Creek Junction to Russell Yard limits, excluding Ashland Terminal, and including all intersecting branches, except Big Sandy and Lexington Subdivisions.

"ASHLAND—BIG SANDY DISTRICT:

"Ashland Terminal and east to and including Elkhorn City and west to and including Lexington.

"* * * * *"

"Rule 11—Bulletined Positions

"(a) Except as otherwise provided in this rule, all new positions and vacancies (except vacancies or new positions of less than 30 calendar days duration) will be promptly bulletined in agreed upon places for a period of five calendar days to all employes on the seniority roster affected. Employes desiring such position shall, within five calendar days of date of posting of the

bulletin, file their applications with the official whose name is signed to the bulletin, copy to the Division Chairman, and an assignment shall be made within the next five calendar days.

"(b) The employe assigned the position and his supervising officer shall be promptly notified and a bulletin of assignment shall immediately be posted for a period of five calendar days at all places where the position was bulletined. Sufficient copies of bulletins and bulletin notices abolishing positions will be furnished Local Chairman on that roster and Division Chairman of that district.

"* * * * *

"(d) When it is apparent that the position will not be filled from the roster on which position is located, bulletin will be posted to all rosters and departments on the seniority district at the same time in order to save time in the filling of the position.

"* * * * *

"Rule 17—Transferring With or Without Position

"(a) When it is decided to make a bona fide transfer of a position from one seniority roster to another, the incumbent of the position will have prior rights to accompany such position. If the incumbent of the position elects not to accompany the position to be transferred, it will be bulletined as provided in Rule 11, not less than 10 days prior to the effective date of transfer; the bulletin to include point and roster to which position is to be transferred. If not thus filled, the position transferred will be considered a new position on the roster to which the position is transferred.

"(b) When it is decided to make a bona fide transfer of a position from one point to another on the same roster, the incumbent of the position will have prior rights to accompany such position. If the incumbent of the position elects not to follow the position, it will be considered a new position.

"(c) Should the incumbent of the position to be transferred elect not to follow his position, he may exercise his seniority as provided in Rules 18(b) and 21, in sequence shown. Employes thus displaced will exercise seniority rights in the same manner.

"(d) The seniority standing of employes transferred from one roster to another under Section (a) of this rule will be transferred to the seniority roster to which the position is transferred, and if the employe is disqualified after transferred, he will exercise seniority on the roster to which transferred as provided in Rule 18(b).

"(e) Employes bidding from one seniority district to another in accordance with Rule 3(g) will establish seniority on the district to which transferring as of the date they actually perform

service on the position to which transferred, and will retain and continue to accumulate seniority on district from which transferred. Should such employes be so affected by the abolishment of position or reduction in forces on the seniority district to which transferred that they cannot exercise seniority rights to any position on that district, they may return to their former district within the time limits and under the provisions of Sub-sections 1, 2 and 3 of Section (f) of Rule 28. No employe, however, may retain seniority rights on more than two seniority districts. Should an employe move to a third seniority district under the provisions of Rule 3(g) he must within ten calendar days from date of transfer select a district to which he may return under the provisions of this rule, forfeiting all seniority rights on the seniority district not selected. The selection must be made in writing to the proper officers of the first and second districts with copy to the Division Chairmen of such districts. Failure of the employe to make a selection will result in his forfeiting all seniority rights on the second seniority district.

"Employes who have transferred from one seniority district to another, bidding in and returning to a position in their former seniority district, will forfeit seniority established in the district from which returning, but will retain their original seniority rights in the district to which returning."

"Rule 18—Reducing Force and Abolishing Positions

"* * * * *

"(b) When reducing forces or abolishing positions, seniority rights shall govern. Employes displaced by reduction of forces or abolishing of positions must (unless prevented on account of personal illness or other unavoidable cause) exercise seniority rights on the roster on which displaced within 10 working days * * * from date displaced or forfeit all seniority rights * * *.

"* * * * *

" 'Cut off' employes on a roster are those not holding regular positions on that roster as the result of the operation of seniority rights under the rules of this agreement.

"(c) When a position is bulletined or when a Group 3 new position or vacancy of 30 calendar days or more duration occurs that is not filled by an employe in service senior to a 'cut off' employe on that roster who has protected his seniority as provided in Section (e) of this rule, 'cut off' employes on that roster shall be returned to the service in the order of their seniority rights* * *,

"* * * * *

"(d) Where no bona fide extra list is established under Rule 3 (h), 'cut off' Group 1 and Group 2 employes will be called in the order of their seniority rights for temporary vacancies or new positions of less than 30 calendar days duration under the provisions of Rule 12, provided they have filed with the proper officer and the Division Chairman within 10 working days * * * from

date actually reduced to 'cut off' list, a letter stating that they desire to perform this temporary work (letter to show territory in their department they will protect), and that they will, as far as possible, make themselves available for it. 'Cut off' employes electing to perform temporary work as set out in this paragraph will be given as much advance notice as possible of the starting time of the position for which their services are required. Should they desire to be temporarily relieved from performing such temporary work, they will 'mark off' on permission from the proper officer and 'mark up' again upon their return. 'Cut off' employes who do not elect within the prescribed time limits to perform such temporary work and those who do so elect, desiring to change their status, may do so by written notice to the proper officer and the Division Chairman.

"'Cut off' Group 3 employes, if available, shall be returned to the service in the order of their seniority rights for Group 3 temporary vacancies or new positions of less than 30 calendar days duration under the provisions of Rule 12.

"(e) Employes 'cut off' * * * must, within 10 working days * * * from date actually reduced to the 'cut off' list, file their name and address, in writing, with the proper officer, copy to Division Chairman, and renew same during the month of November of each year. Employes 'cut off' during November of any year, and filing their address within 10 working days * * * after date actually reduced to 'cut off' list, will not be required to again file their address until November of the following year. 'Cut off' employes must promptly advise the proper officer, copy to Division Chairman, of any change in address.

"Note: Group 3 employes 'cut off' will only be required to keep the proper officer and Division Chairman advised of their address.

"Employes failing to protect their seniority rights as provided in this Section (e) and those failing to return to service on the roster from which 'cut off', within 7 days after being notified by mail or telegram sent to the last address given, unless prevented by sickness or other unavoidable cause or giving satisfactory reason for not doing so, forfeit all seniority rights.

"(f) In all cases of abolishment of regular assignments in Groups 1 and 2, employes affected shall be given notice by the proper officer of such intended abolishment as far in advance as possible, but in no case shall less than 4 working days' notice be given. Division Chairman will be notified when such assignments are to be abolished.

"In all cases of abolishment of regular assignments in Group 3, employes affected shall be given notice by the proper officer of such intended abolishment as far in advance as possible, but in no case shall less than 2 working days' notice be given. Division Chairman will be notified when such assignments are to be abolished.

"* * * * *"

"Rule 26—Seniority Rosters

"(a) Seniority rosters and employment date lists of all employes in each seniority district will be revised as of January 1, and will be posted in agreed-upon places accessible to all employes affected not later than January 15 of each year.

"* * * * *

"(h) SEPARATE SENIORITY ROSTERS for employes covered in Groups 1, 2 and 3, respectively, shall be made, and a standard form of roster shall be used as follows:

District ..... Department .....
Roster (Name of Roster)..... Location .....
Group.....as of Jan. 1) Date Issued .....

Name	Seniority Date On this District	On this Roster	Present Location	Position Number	Title	Rate of Pay

(Signed) .....
(Name of Officer)

.....
(Title)

"* * * * *".

Rule 44—Maintaining Rates

"When there is a sufficient increase or decrease in the duties and responsibilities of a position or change in the character of service required, the compensation for that position will be properly adjusted by negotiation with the General Chairman or his duly authorized representative, but established positions will not be discontinued and new ones created under the same or different titles covering relatively the same class or grade of work, which will have the effect of reducing the rate of pay or evading the application of these rules."

"Rule 65—Date Effective and Changes

"This Agreement shall be effective as of January 1, 1945, and shall continue in effect until it is changed as provided herein or under the provisions of the Railway Labor Act as amended.

"Should either party to this Agreement desire to revise or modify these rules, thirty (30) days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately on the expiration date of said notice unless another date is mutually agreed upon."

Rule 1 is the Scope Rule and says in the opening sentence:

"These rules shall govern the hours of service and working conditions of all of the following class of employes:"

Rule 1 is likewise a classification rule, as it separates the employes covered by the Agreement into three separate groups, according to work performed by the employes classified within the groups.

Rule 2 declares the broad intent of the parties as to how seniority rights may be exercised.

Rule 3 provides the method by which employes embraced within the three groups shall establish seniority. Employes, in the order of their individual seniority dates, thus acquire rights to the performance of the work which is the subject of the Agreement, as set forth in Rule 4.

Rule 6 establishes the boundary of each seniority district and names the departmental rosters established within the confines of each district for each group of employes.

On the Huntington Seniority District, for example, there are the following Departmental and Group rosters:

Accounting Department	— Group 1
Accounting Department	— Group 2
Mechanical Department	— Group 1
Mechanical Department	— Group 2
Mechanical Department	— Group 3
Personnel Department	— Group 1
Real Estate Department	— Group 3
Reclamation Plant Department	— Group 1
Reclamation Plant Department	— Group 2
Special Agents Department	— Group 2
Stores Department	— Group 1
Stores Department	— Group 2
Stores Department	— Group 3
Traffic Department	— Group 1
Transportation Department	— Group 1
Transportation Department	— Group 2
Transportation Department	— Group 3
Chief Medical Examiner Department	— Group 1

Rule 6(c) provides that:

"Seniority districts shall not be changed except by mutual agreement between the representatives of the parties hereto."

Rule 6(e) provides that:

"Any change in the established rosters must be made by agreement between the parties hereto."

Rule 6(f) clearly defines and distinguishes between the Huntington district, from which the work in question was taken and the Ashland-Big Sandy district, to which the work was transferred.

Rule 11 provides that vacancies will be bulletined to employes on the seniority roster (in the Department) where the vacancy occurs. If not filled, the vacancy is then bulletined to all rosters of the Group in the seniority district. There is no provision for bulletining vacancies to employes on other seniority districts.

Rule 17 has no application to the instant dispute except as to broad principles. It is quoted because, in Award 6655, it was held that transfer of positions from one seniority district to another could be accomplished without agreement between the parties provided the Carrier followed the procedures laid out in Rule 17. The Employes mean no reflection upon the learned and distinguished Referee who wrote the "Opinion" in Award 6655. However, it is respectfully submitted that the award is in error. The error is possibly due to the Employes' failure to make clear the difference between the **procedural** steps outlined in Rule 17 and the positive requirement in Rules 6(c) and (e) that the parties must reach agreement before changes may be made in seniority districts and rosters. A line of reasoning which holds that abolishing 23 positions in a district and assigning the work to another district does not effect a "change" in both districts fails to consider that a "roster" is merely a list of names with little or no significance unless the work which is performed by the employes whose names appear on the "roster" is secured to them by the Agreement. The right of an employe to "follow the work", if it is moved, arises, therefore, from the very nature of the contract of employment because a contract which could be annulled at the whim of one of the parties is no contract at all.

The instant case illustrates the fact that it is most unrealistic and unworkable to hold that Rule 17 is the only rule which governs the transfer of positions from one roster to another. Here, the Carrier abolished 23 positions in one district and created 9 in another. Rule 17 provides for no such contingency. An Agreement between the parties as to the rights of the employes affected was very clearly required. The Carrier made no effort to reach an agreement, nor to apply the principles of Rule 17, although it argued in Award 6655 that Rule 17 alone has application in such situations.

Rule 18(b) provides that when positions are abolished or forces reduced, seniority rights shall govern. In the instant case, 23 positions were abolished on the Transportation Rosters, Huntington Seniority district. Under Rule 18(b) the employes could only displace junior employes of their group and roster. They had no rights on the district to which their work was transferred. Surely it could not be argued that an employe's "seniority rights" means only a right to such work, if any, that the Carrier may choose to leave on the district where the employe holds seniority. Such a "right" would cease to be a right and become merely a privilege which the Carrier could annul at its whim.

Rule 44 provides that established positions will not be discontinued and new ones created under the same or different titles covering relatively the same class or grade of work, which will have the effect of reducing the rate of pay or evading the application of these rules.

Unquestionably, established positions were discontinued and new ones created covering the same class of work, and the Employes respectfully submit that the effect was to evade application of the rules, specifically Rules 4, 6, 18 and 65.

Furthermore, it is beyond argument that the action evaded what the Carrier itself has argued is the proper application of Rule 17.

A factual situation somewhat analogous to the instant case was presented to your Division in Docket CL-1692 (Award 2050). In the "Opinion" (Referee Tipton) it was held:

"New Athens is located on the St. Louis Division and East St. Louis is located in East St. Louis Terminal. Separate seniority rosters cover the clerical employes at the two points. The principal commodity handled out of New Athens is stoves. For all practical purposes New Athens might be termed a one-man station except when stoves were shipped out of there in the Fall and Winter, when, to relieve the Agent, a clerical position was established prior to 1940.

"In August, 1940, the Carrier inaugurated the system of billing carload shipments of stoves from New Athens to East St. Louis, where the cars broke bulk and shipments were reloaded to various destinations. In other words, commencing with the August, 1940, season, the usual clerical position was not established at New Athens, and since then, these stove shipments are sent to East St. Louis under slip billings in carload lots, and the employes in the East St. Louis district now perform the work formerly performed at New Athens. The bills of lading and record portions of these less-than-carload waybills are then returned to New Athens and made a part of the permanent station records at that point.

"Rule 4(a) provides that seniority rights of employes will be confined to their respective seniority rosters. This Board has repeatedly held that positions or work may not arbitrarily be removed from the confines of one seniority district and placed in another, as was here done. See awards 99, 198, 199, 610, 612, 752, 753, 973, 1403, 1440, 1611, 1612, 1685, 1711, 1808 and 1892.

"The Board holds that under the rules as interpreted by the past practices that when the work became so heavy that it could not be performed by the Agent, that instead of farming out this work to the East St. Louis District, the Carrier should have established a clerical position at New Athens, to do this seasonal work.

"Neither does the fact that the Carrier handles carload shipments of bananas under slip billing, and have such shipments revenue waybilled in carload lots from common diversion point, have anything to do with this case. Such action would not permit the Carrier to remove the work here in question from the St. Louis seniority district arbitrarily and place it in the East St. Louis district."

In Docket CL-5386 (Award 5396) the factual situation was that the Carrier abolished 5 positions in the Transportation Department and 4 positions in the Motive Power Department, the two departments being separate seniority districts. The Carrier at the same time established 5 positions in the Transportation district to perform the work of all the abolished positions. The Carrier complied with the procedural requirements of Rule 18 of that Agreement, but there was a Rule 5 in effect reading:

"Rule 5—Seniority Districts: Seniority districts as now established shall be continued unless and until changed by mutual agreement between the management and the accredited representatives of the employes."

In the "Opinion" (Referee J. Glenn Donaldson) it was said:

"Rule 18, entitled 'reorganization' outlines procedurally how seniority is to be handled in event of reorganization or consolidations. There is nothing therein contained which expressly negates other rules in the Agreement, rather it must be read in a manner to presuppose conformance with such rules. See Award 2490. To interpret it otherwise is to nullify Rule 5 by implication which we cannot justify in face of the many past Awards of this Division protecting district seniority. See Awards 3964, 4076, 4653 and 5375, among others." (Emphasis added.)

In Award 6938 (Referee Coffey) the circumstances were that the Carrier removed, without agreement, about four hours work per day from one seniority roster and assigned it to employes on another roster. The Agreement contained Rule 28, reading:

"Seniority districts as shown on pages 58 to 61 shall not be changed except by mutual agreement between the parties signatory hereto."

There was also a procedural rule, similar to Rule 17 between the parties, which the Carrier claimed "stipulates an affirmative condition" to the effect that the Carrier could transfer positions from one roster or district to another, without agreement between the parties, so long as the employes were afforded the protection of the provisions of the procedural rule. The "Opinion of Board" said:

"It is in this permissive right of the employe to exercise seniority that the Carrier sees an 'affirmative condition' stipulated by rule whereby 'positions or work' may be transferred from one seniority district to another seniority district, as was done in this case, at the Carrier's election. That is to say, the Carrier seems to be of the opinion that Rule 28 bears no relationship to and has no bearing on Rule 46. The Employe Representative is of a contrary opinion.

"It is the Board's duty to give all possible credence and effect to both rules without doing violence to either, and to construe them in such manner as to carry out the mutual intent of the parties as we find the same expressed or clearly implied.

"It has been difficult to follow the argument that the rules are not related. Greater difficulty has been posed by an expression of views within the Board, that restrictive language should have been written into the body of Rule 46, similar to that found in Rule 45, and making the transfer of work 'subject to negotiation between the parties signatory hereto,' if that were the intent of the parties.

"Both arguments lose sight of how elaborate and complex are the rules of the Agreement on the subject of seniority alone. It would have been needless repetition to have written language into each separate rule to express the intent that any change bearing upon seniority is subject to negotiation. We can think of no better way of expressing the intent consisely and more forcefully in this case than by rule of general application.

"Rule 28 and Rule 46, the same as many other rules found in the Agreement, are on the subject of seniority. Reference by Rule 28 to pages '58 to 61,' and examination of those pages, shows the rigidity with which the lines of seniority are drawn. Those lines are relaxed to the extent, and we believe only to the extent, that we can find a clear expression therefor in Rule 46. That rule admits of an equally valid interpretation that the subject matter is transfer of employes, and, in the absence of an express grant of right, the Carrier should not be heard to say, in our opinion, that despite Rule 28, Rule 46 serves as authority for the transfer of work or positions without mutual agreement between signatory parties.

"Finally, it is held by some of the Board, that the language of Rule 28 does not admit of the construction that a majority of the Board places on it, since the effect of the Carrier's action in this case, according to one point of view, has not been to make a change in seniority districts.

"The employe has a property right in the seniority that gives him a place on the seniority roster. That seniority attaches to the work, position, and roster in the seniority district where the employe has earned rights. Where the position or work is transferred to another roster in another seniority district, the employe who follows his work in accordance with Rule 46, is protected in his seniority, but at the expense of the one who has rights in the district to which the work or position is transferred. So on the one hand we have an employe with his feet in two puddles, and on the other hand, we have an employe whose rights otherwise would have been secure in his seniority district, except for the invasion of his territory by one from another seniority district. It seems to us that this amounts to a change in seniority districts.

"The Employe Representative is charged with making Agreements, collective in scope, and for the benefit of all employes covered thereby. Thus, its first duty is to all and not just a few, and while it may, as it has done by Rule 46, contract without discrimination on behalf of a smaller group similarly situated and to be treated alike at the expense of the whole, its action in doing so is subject to close scrutiny and and rules like Rule 46 are to be strictly construed. Finding nothing in the express language of that rule as opposed to Rule 28 that would indicate the Employes collectively intended to give up all right to be consulted in the matter of transferring 'positions or work' from one seniority district to another, the collective and indiscriminate rights of all employes under the Agreement can best be preserved by allowing the Employe Representative to now exercise its inherent right to an equal voice in whether the work should be restored to the Indianapolis Division Roster or remain at its present location."

In Award 6309 the circumstances were that the Carrier unilaterally transferred certain work, along with one employe, from one seniority district to another. In sustaining the Employes' claim the Board (Referee Wenke) said:

"Incident to the transfer of this work Carriers, at his election to do so, moved Timekeeper L. L. Burton from seniority district of the Auditor of Disbursements, St. Louis, Missouri. As a result Burton moved himself, and his family, from Fort Worth to St. Louis. Claim is made on behalf of Burton for expenses incident thereto.

"In the beginning these Carriers had the inherent right to have their work performed wherever they might desire and they have this right, except as they have restricted themselves by collective bargaining agreements with their employes.

"Rule 5 of the parties' Agreement, covering 'Seniority Districts' provides:

'Seniority district shall be as follows:

'Accounting Department

* * * * *

'Auditor Disbursements

'Auditor Revenues

* * * * *

'Auditor, Texas Lines'

"We have often said that positions or work may not unilaterally be removed from the confines of one seniority district and placed in another. As stated in Award 4076: 'The transferring of work from one seniority district to another is a violation of the seniority rights of the employes in the district from which the work is taken.' See Awards 1808, 2050, 3964, 5397 and 6066 of this Division.

"But Carriers depend on Rule 23 (a) of the parties' effective Agreement as authorizing them to do what they did. Rule 23 (a) provides:

> 'Employes may follow their positions when same are transferred from one seniority district to another. The incumbents shall have prior rights to the positions to be transferred, if they elect to accompany same. Those electing not to follow their position may exercise their seniority rights as per Rule 21 and their positions will be bulletined, first, in the seniority district from which they are to be transferred, and if necessary, second, in the seniority district to which they are to be transferred. Seniority of employes transferred under such circumstances shall be transferred to the new seniority district.'

"Rule 23 (a) is a permissive rule and grants to an employe certain rights when the work of his position is transferred by Carriers from one seniority district to another. Carriers, in view of our holdings, no longer had the inherent right to transfer

work from one seniority district to another, and could only do so if authorized by the Agreement. We think, standing alone, Rule 23 (a) might be construed to have that implied effect. See Award 6066 of this Division. But all rules of an Agreement relating to a subject must be read and construed together in order to get the correct intent and meaning thereof. Here the 'Note' to Rule 5, 'Seniority Districts' expressly provides:

> 'The above seniority districts are subject to change only when so agreed by representative of Railway and General Chairman.'

"Certainly this 'Note' leaves nothing in doubt. It expressly states that what was here done cannot be properly done except by agreement. What Carriers did was in violation thereof.

"As stated in Award 756:

> 'On the admitted transfer of the work from one seniority district to another without agreement of the parties, the Board cannot do otherwise than find that the last paragraph of Rule 21—the seniority district rule— has been violated.'

"See Awards 1711, 5396 and 5397 of this Division."

In a memorandum accompanying Award 1680 Referee Garrison stated certain conditions under which he concluded the Board should overrule a previous award. The Employes will quote and discuss the principles set forth by Referee Garrison in relation to Award 6655:

> "1. It may sometimes happen that, through inadvertence, an award may be handed down which upon subsequent study turns out to be clearly contrary to earlier awards, though at the time this was not perceived. It would seem proper in such circumstances to overrule the conflicting award."

The Employes submit that almost from the date your Division began to function it has been held that the arbitrary transfer of work from one seniority district or roster to another is violative of provisions similar to or identical with Rule 6 (c) and (e). For example, it was held by Referee Swacker in Award 752:

> "With respect to assigning the remaining clerical duties of the position in question to Clerks in another seniority district, arbitrarily, this, also repeatedly has been held to be in violation of collective agreements. Compare Awards No. 99, 198, 199, 610, 612 and 718. Rule 4 (o) of the agreement between the parties here expressly prohibits the disturbance of existing seniority districts . . ."

Referee Garrison's second point is as follows:

> "2. But if the inadvertently conflicting award in the example just put is followed without question by other Awards before the fact of conflict is discovered, two opposing lines of authority will then have been created, and it will be necessary to

follow one and reject the other. Which to follow and which to reject will depend partly upon the relative extent of the two lines and partly upon their intrinsic merits, in degrees varying with the circumstances."

The preponderance of awards on the subject have held that the transfer of work from one district or roster to another is a matter for negotiation and agreement, so far as the rights of employes affected is concerned.

As to the intrinsic merits, the factual situation being that 23 positions were abolished in one district and 9 created in the district to which the work was transferred, it becomes obvious that Rule 17 cannot be applied unless and until there is agreement as to how many and which employes are to be permitted to transfer with their seniority dates, to the district to which their work is transferred. The facts in Award 6655 were not such as to demonstrate the unworkability of Rule 17, standing alone.

It is stated in the "Opinion", Award 6655.

"Moreover, the use of the words 'when it is decided to make a bona fide transfer of a position' is another indication that unilateral action by Management was contemplated. The requirement of bona fide is an apt qualification of managerial decision, hardly of conference and agreement; and a decision to make a bona fide transfer clearly based on operating reasons, which is an appropriate subject of managerial decision, hardly of conference and agreement."

Decisions to change operating procedures, locations, etc., are managerial decisions. But when those decisions involved removing work from one roster to another, then the rights of the employes affected becomes a matter for negotiation, because such transfers involve a change in seniority districts and rosters (Rule 6 (c) and (e)).

Referee Garrison's third point is as follows:

"3. It may sometimes happen through an incomplete job of presentation, an award may be handed down which later may be regarded as clearly erroneous in the light of material fasts or supporting arguments of a decisive nature which should have been, but were not, presented for consideration in the prior Award. It would seem proper in such circumstances to overrule the prior Award."

Since Award 6655 is contrary to the intent of the parties in entering into the Agreement, and their mutual interpretation thereof as evidenced by the many agreements made to apply to specific transfers of work from one district or roster to another, it is evident that the Employes failed in some manner to present the facts and involved Rules in a complete and convincing way.

Referee Garrison's fourth point is as follows:

"4. But if the erroneous Award in the example just given is followed without question by other Awards before the discovery is made that material facts or supporting arguments of a decisive

nature should have been, and were not, presented for consideration in these Awards, the question of whether or not to overrule these Awards after the discovery has been made cannot be answered by any formula. The decision will involve balancing the need for stability and predictability against the need for correcting error where error has demonstratably been found; it will turn upon such questions as the number and age of the Awards, the importance and extent of adoption of the rule which is in issue, the seriousness of the error, and the significance of the overlooked material which should have gone into the making of the Award."

Few, if any, Awards (none on this property) have followed Award 6655. Award 6938, quoted supra, returned to the earlier and preponderant interpretation of analogous rules. The seriousness of the matter is that the Carrier, as shown by the facts in the instant case, appears to construe Award 6655 as an invitation to strike at the very vitals of the Agreement, Seniority. The Employes are certain that the distinguished Referee who wrote the "Opinion" in Award 6655 had no such intention. But such is the interpretation the Carrier has apparently placed upon the Award.

Referee Garrison's fifth point is as follows:

"5. If a case is presented involving the same controlling facts and the same rule as were involved in a previous Award, and the same data and material arguments are presented as were presented in the previous case, the Award in the previous case should be followed (unless it is contrary to earlier Awards, in which case it will fall under example No. 1 above). For in such a situation there is nothing new which has not been passed upon and taken into account before, and the only question is whether the personal judgment of the later referee (assuming the cases to have been decided with referees participating) should be substituted for that of the former referee."

The facts in Award 6655 and the instant case are not the same. In the earlier case the Carrier followed the procedures spelled out in Rule 17; in the instant case it ignored the Rule which it earlier insisted had sole application.

The Employes recognized that the Board will not lightly overrule a prior Award, and properly so. It was said by Referee Blake in Award 2517:

"Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous Award construing the identical provisions of this contract."

The Employes believe it has been shown that Award 6655, perhaps because of Carrier's strict compliance with one rule in that instance, is "palpably wrong" because the instant dispute presents a factual situation showing that Rule 17 was not intended to stand alone in that it contains only general principles that cannot be, and have not been, applied in all cases of the transfer of positions from one seniority district or roster to another. That there are instances when the Board is justified in overruling prior awards cannot be disputed. For example, Referee Shake said in Award 4819:

"To ignore the distinguishing facts and follow that (prior) award in the instant case would result in a dangerous precedent for the gradual and piece-meal substitution of Board-made rules for the clearly expressed provisions of the negotiated agreement of the parties."

And Referee Whiting said in Award 6094:

"Whether a prior award constitutes a controlling precedent is dependent upon the soundness of the reasoning upon which it is based or upon its being one of a long and consistent line of decisions."

It is hereby affirmed that all data herein contained in support of Claimants' position have been submitted in substance to the Carrier and made a part of the claim.

CARRIER'S STATEMENT OF FACTS: There is on file with the Third Division, National Railroad Adjustment Board, General Agreement No. 7, effective January 1, 1945, with supplements and addenda thereto, covering clerical employes on this Carrier's Chesapeake District. Such agreement is controlling where it may be applicable, and it is made a part of the record in this case by reference.

Huntington, West Virginia, and Ashland, Kentucky, the two points enumerated in this claim, are cities on the Carrier's east west main line. They are approximately 16 miles apart. Huntington is the division headquarters for the Huntington Division. Ashland is the division headquarters for the Ashland Division.

A map showing the Carrier's system is **Carrier's Exhibit 1.** This map has been marked to show dividing lines between the Chesapeake and Pere Marquette Districts.

At Huntington, West Virginia, and at Ashland, Kentucky, freight stations are operated separate and apart from passenger stations. Clerical forces under the Clerks' Agreement are maintained at each point for carrying on the freight office and freight warehouse work. The clerical forces at Huntington are on the Huntington seniority district, and the clerical forces at Ashland are on the Ashland seniority district.

This case involves **less than carload freight.**

It has been well established custom and practice down through the development of railroad transportation for railroads to handle less carload shipments in bulk units best fitting requirements of the service and handling, and it is a change such as has been made from time to time without question down through the years which prompts the instant case.

Before showing what is involved in the instant case, it will be shown what has to happen with a typical less carload shipment, and as this case will be heard in Chicago, a shipment originating there will be used as an example.

A shipper in Chicago has a 200 lb. shipment to go to Columbia, Virginia. The patron in Chicago may telephone and have the pick-up and delivery contractor pick up the shipment at his place of business, or the

patron may take the shipment to the freight station at 13th and Lumber Streets in his own conveyance.

Now with the 200 lb. shipment on the floor of the freight house, what is to be done with it? Obviously it will not be loaded into a car by itself, so that 200 lbs. alone will move in one car.

The general plan of handling is to load this shipment into a car with similar shipments going to a transfer point which can best serve in getting this shipment quickly to its destination in good condition. Thus, the first determination must be as to where the destination is located. When this has been ascertained, consideration can be given to the schedule for less carload package car movements, the current publication of which is dated March 1, 1956, and which is **Carrier's Exhibit 2.**

The package car schedule shows the manner in which break bulk cars are set up at any given time to meet the current less carload freight shipping conditions; and if page 4 be turned to, it will be seen that in the upper left hand portion of the sheet information is provided as to break bulk cars made by the Chicago freight station.

Columbia, Virginia, is located on the James River Line between Clifton Forge, Virginia, on the west, and Richmond, Virginia, on the east. Therefore, first consideration can be given to cars that may be made on these two points for breaking bulk, and **Carrier's Exhibit 2** shows that a car is daily made on both Clifton Forge and Richmond.

The figure following each car line in the package car schedule shows the scheduled days it takes the break bulk car to run from Chicago to the particular point. In the case of Richmond, this is 3 days. In the case of Clifton Forge the time is 2 days. Therefore, if transferred at Clifton Forge for further handling on to Columbia, the transfer can be effected while the Richmond car which left Chicago in the same train is still en route to Richmond.

Freight stations make cars referred to in railroad parlance as **way cars** to convey shipments of less carload freight whose destination is between terminals of local freight trains; and if one will look across page 4 of the package car schedule, it will be seen that there is a list of way cars made at Clifton Forge. Those without asterisk are made daily. Those with asterisk are every other day, twice a week, etc., to fit in with schedules on which local freight trains are operated.

To illustrate, on the branch line between Eagle Rock, Virginia, and New Castle, Virginia, trains are run only on Mondays and Thursdays, and it will be seen under the information for Clifton Forge that the way car Eagle Rock to New Castle has an asterisk, this denoting that package cars will be made at Clifton Forge for movement on this branch line on those two days of the week. Freight loaded through Friday will go out on the branch line on Monday, and freight loaded through Wednesday will go out on the branch on Thursday.

Now, returning to the shipment Chicago to Columbia, Virginia, being illustrated with, it will be noted that Clifton Forge makes a way car daily (no asterisk) for stations between Gladstone, Virginia, and Westham, Virginia, the territory in which Columbia is located. Therefore, this shipment from Chicago would go into that car, be handled overnight from Clifton

Forge to Gladstone in a through freight train, and be taken on in the local freight on the following day for delivery at Columbia, with delivery the fourth day from Chicago.

But handling all less carload shipments is not so simple as that just illustrated with. In many cases the individual shipment must be interchanged between two or more separate railroads.

In other cases transfer points have to be changed because of changes in volume of traffic, either upward or downward. By this is meant that in certain cases freight is sent to a transfer point for putting with other freight to go on to its destination. The volume may increase to the extent that instead of transferring such freight, a car can be made on the particular point for setting off at that location for unloading of the freight without having to delay the local freight train awaiting unloading of all the freight at the station. A good example of this is Williamsburg, Virginia.

If page 8 of the package car schedule be looked at it will be seen that Richmond, Virginia, makes a car daily for Williamsburg, Virginia. In line with this, if a Chicago shipper brings a shipment for Williamsburg to the freight station, the Chicago freight station will put it into the car made daily to break bulk at Richmond, Virginia, and this shipment goes on to Williamsburg in the car made daily at Richmond for that point.

Occasionally shipments by their nature result in the making of special less carload cars. For instance, Richmond freight station might receive a 200 lb. shipment for Orange, Virginia, and ordinarily this freight would go to Clifton Forge for placing in special car made on Orange. However, if a heavy boiler shipment were to be brought to the Richmond freight station consigned to Orange, in all probability a so-called "overhead" car would be made directly to Orange. Thus, the boiler materials would be placed in a car and all other freight that day for Orange would be placed in the same car along with it, in the interest of expediting the handling of the freight and avoiding, if practicable, transfer of such heavy materials en route.

Where practicable break bulk cars are made on transfer points on other railroads, in order to expedite handling of the interline shipments and to cut down on the amount of transferring necessary, with consequent loss and damage. One illustration of this is that Chicago (as will be seen from page 4 of the package car schedule) makes a break bulk car on the L&N at Atlanta, Georgia, this car being handled by the C & O from Chicago to Cincinnati and interchanged with the L&N as a carload movement at that point. A car is made for the Seaboard Air Line at Hamlet, North Carolina, and for the Atlantic Coast Line at Rocky Mount, North Carolina. Southeastern area shipments for the Southern Railway go in a daily car to Spencer Transfer, North Carolina, and so on.

If the incoming side of the package car schedules be referred to, it will be seen that cars to break bulk at Ashland, Kentucky, are made by other railroads as follows:

Akron, Ohio	Erie
Canton, Ohio	Nickel Plate
Chattanooga, Tenn.	Southern
Cincinnati, Ohio	B&O
Cincinnati, Ohio	NYC
Cleveland, Ohio	NYC

Cleveland, Ohio	Nickel Plate
Columbus, Ohio	NYC
Columbus, Ohio	Pennsylvania
East St. Louis, Ill.	B&O
East St. Louis, Ill.	Southern
Hamlet, N. C.	Seaboard
Huntington, W. Va.	B&O
Indianapolis, Ind.	NYC
Johnson City, Tenn.	Clinchfield
Louisville, Ky.	L&N
Mullens, W. Va.	Virginian
New York, N. Y.	Pennsylvania
Parkersburg, W. Va.	B&O
Philadelphia, Pa.	Pennsylvania
Pittsburg, Pa.	Pennsylvania
Portsmouth, Ohio	N&W
Proviso, Ill.	C&NW
Roanoke, Va.	N&W

In the opposite direction, Cincinnati freight station makes cars going to other railroads for breaking bulk as follows:

Bluefield, W. Va.	N&W
Burr Oak, Ill.	Rock Island
Chattanooga, Tenn.	Southern
Chicago, Ill.	Santa Fe
Chicago, Ill.	Burlington
Galewood, Ill.	Milwaukee
Hamlet, N. C.	Seaboard
Johnson City, Tenn.	Clinchfield
Louisville, Ky.	L&N
Mullens, W. Va.	Virginian
Muncie, Ind.	Nickel Plate
Proviso, Ill.	C&NW
Rocky Mount, N. C.	ACL
Spencer, Transfer, N. C.	Southern

These car lines are revised from time to time to meet the conditions as they prevail at any particular time, and no question of the right of the Carrier to make such changes has ever before been brought up by the Clerks or any other Organization.

Early in 1955 study by the Carrier of shipments being transferred at Huntington, West Virginia, showed that better service could be rendered and the over-all situation improved if certain cars which had theretofore been billed on Huntington, West Virginia, for breaking bulk at that point, were billed to Ashland, Kentucky, and several other points to break bulk at those points. In line with this, the Carrier revised its package car schedules accordingly, so that cars which had been billed on Huntington were thereafter billed to Ashland and several other points.

The Carrier emphasizes that this case in no manner involves cars which had been billed to Huntington and were removed from that location and worked at Ashland. Every car that was originally billed to break bulk at Huntington was worked at that point, and the only cars worked at Ashland have been those billed to that point.

At the same time, certain cars which had been billed to Huntington, West Virginia, were thereafter billed to Clifton Forge, Virginia, and Richmond, Virginia.

The following tabulation shows cars on which the billing point was changed as a result of the study made early in 1955:

Origin of Package Car	Formerly Billed to	New Billing Station	Effective Date
B&O-Huntington, W. Va.	Huntington, W. Va.	Ashland, Ky.	3-22-55
B&O-E. St. Louis, Ill.	Huntington, W. Va.	Ashland, Ky.	3-22-55
Clinchfield-Johnson City	Huntington, W. Va.	Ashland, Ky.	4- 4-55
NKP-Cleveland, O.	Huntington, W. Va.	Ashland, Ky.	3-22-55
N&W-Portsmouth, O.	Huntington, W. Va.	Ashland, Ky.	3-22-55
Penn-Columbus, O.	Huntington, W. Va.	Ashland, Ky.	3-22-55
Penn-New York City	Huntington, W. Va.	Ashland, Ky.	3-22-55
Penn-Philadelphia, Pa.	Huntington, W. Va.	Ashland, Ky.	3-22-55
Penn-Pittsburgh, Pa.	Huntington, W. Va.	Ashland, Ky.	3-22-55
Southern-Chattanooga	Huntington, W. Va.	Ashland, Ky.	3-22-55
Virginian-Mullens, W. Va.	Huntington, W. Va.	Ashland, Ky.	3-22-55
C&O-Detroit, Mich.	Huntington, W. Va.	Ashland, Ky.	4- 1-55
C&O-Maysville, Ky.	Huntington, W. Va.	Ashland, Ky.	4- 1-55
C&O-Barboursville, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Hinton, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Huntington Shops, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Kenova, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Logan, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Mt. Hope, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Oak Hill, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Raleigh, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Rainelle, W. Va.	Huntington, W. Va.	Ashland, Ky.	4-18-55
C&O-Lynchburg, Va.	Huntington, W. Va.	Clifton Forge, Va.	4- 4-55
Southern-Spencer Transfer	Huntington, W. Va.	Clifton Forge, Va.	4- 4-55
C&O-Newport News, Va.	Huntington, W. Va.	Richmond, Va.	4- 4-55
C&O-Norfolk, Va.	Huntington, W. Va.	Richmond, Va.	4- 4-55
ACL-Rocky Mount, N. C.	Huntington, W. Va.	Richmond, Va.	4- 4-55
ACL-Florence, S. C.	Huntington, W. Va.	Richmond, Va.	4- 4-55
ACL-Sumter, S. C.	Huntington, W. Va.	Richmond, Va.	4- 4-55
SAL-Hamlet, N. C.	Huntington, W. Va.	Richmond, Va.	4- 4-55
SAL-Henderson, N. C.	Huntington, W. Va.	Richmond, Va.	4- 4-55

The foregoing is not to be interpreted to mean that 22 new break bulk cars were to go to Ashland instead of Huntington, two new cars go to Clifton Forge instead of Huntington, and seven new cars go to Richmond instead of Huntington, because in 5 instances cars were already being made on Ashland, and changing of the billing point for breaking bulk merely meant that more freight will go into the same 5 cars.

To show specifically what is involved in this respect, reference may be had to the C&O car shown as formerly being made at Barboursville, West Virginia, for Huntington. Under the old handling a separate car was made at Barboursville for both Huntington and Ashland. Under the new plan, all that formerly went into two cars (one for Huntington and one for Ashland) now goes into the one car for Ashland for transfer there.

Similarly, Lynchburg, Virginia, made a car on both Huntington and Clifton Forge. Now all is loaded into the one Clifton Forge car.

Norfolk (under the old plan of handling) made a car on Richmond and another on Huntington. Now everything is put into the Richmond car, and the same is true with regard to the Newport News cars—all freight now being put into the Richmond car, and a total of 9 cars in this status, leaving only 13 car lines on which there was real change of transfer point.

Careful records are kept of the tonnage going into each of the cars to permit such adjustments in car lines from time to time to meet changed conditions, and it is obvious that such changes must be made in order to give efficient service and at the same time have reasonable amounts of freight moving in all package cars. As stated above, such changes are not new, but have been made in identical manner from the beginning of railroads, without question.

Re-arrangement of car lines may mean adjustment of forces at freight stations or it may not, according to the conditions. Richmond and Clifton Forge were able to absorb the additional freight without additional force at that time, but the sending in of such freight may result in adding force at those points at some later time, because the force must always be maintained to properly handle the business.

Because the business went down at Huntington, West Virginia, as a result of less cars being worked there, their force was reduced during the period the Employes claim is connected with this case by the following positions:

Title of Position	Position No.	Rate	Date Abolished
Check Clerk	A-206	$13.71	4-13-55
Check Clerk	A-219	13.71	4-13-55
Check Clerk	A-218	13.71	4-19-55
Check Clerk	A-170	13.71	4-22-55
Check Clerk	A-197	13.71	4-22-55
Check Clerk	A-200	13.71	4-22-55
Check Clerk	A-220	13.71	6- 2-55
Asst. Gen. Fman	A-33	16.29	5- 5-55
Foreman Clerk	A-57	14.61	5- 5-55
Delivery Clerk	A-88	13.71	5- 5-55
Trucker	C-48	1.5575	4- 1-55
Cooper	C-19	1.58	4-18-55
Stower	C-12	1.58	4-18-55
Stower	C-21	1.58	4-18-55
Stower	C-25	1.58	4-18-55
Trucker	C-50	1.5575	5- 2-55
Trucker	C-41	1.5575	5- 2-55
Trucker	C-47	1.5575	5- 2-55
Trucker	C-29	1.5575	5- 2-55
Trucker	C-60	1.5575	5- 2-55
Trucker	C-45	1.5575	5-17-55
Trucker	C-38	1.5575	5-17-55
Trucker	C-40	1.5575	5-17-55

All procedural requirements of the agreement were met in connection with abolishment of such positions, no contention having been made by the Employes in this respect in conference on the property.

As a result of increased freight volume at Ashland during the same general period, the following positions were put on there:

Title	Rate	Established
Check Clerk	$14.11	3- 1-55
Check Clerk	14.11	4- 7-55
Asst. Foreman	15.09	4- 8-55
Steno.-Clerk	13.89	4-22-55
Trucker	1.5575	4-12-55
Trucker	1.5575	4-19-55
Stower	1.58	5- 3-55
Trucker	1.5575	5- 3-55
Trucker	1.5575	5- 3-55

The Employes have indicated that they base their claim on Rules 1, 2, 3, 4, 6, 11, 14, 17, 18, 26, 37, 44, 46, 47, and 65 of General Agreement No. 7.

The Carrier has taken the position that none of such rules have been violated.

POSITION OF CARRIER:

Issue Defined

The Employes in appealing this claim in letter of October 21, 1955, (Carrier's Exhibit 3) have contended that changing of car lines as shown by the Carrier's Statement of Facts was arranged by the Carrier without prior conference or agreement with the Employes. Therefore, the contention is that the rules cited required that the Carrier negotiate before it could change the car lines as shown above, and the question becomes simply this:

DID THE CARRIER VIOLATE THE CLERKS' AGREEMENT IN CHANGING LESS CARLOAD PACKAGE CAR LINES SO THAT CERTAIN CARS FORMERLY LOADED ON HUNTINGTON, W .VA., FOR BREAKING BULK WERE THEREAFTER LOADED TO BREAK BULK AT ASHLAND, KY., CLIFTON FORGE, VA., AND RICHMOND, VA.?

Carrier's General Statement of Position

The Carrier will show that:

1. Less carload freight car lines have been changed from time to time down through the development of railroad transportation without question, specific instances of which will be given.

2. The parties knew when they made their current general agreement that such was the practice and custom, and no rule was embodied requiring conference or negotiation to continue what had always been done and understood as a managerial obligation, responsibility, and right.

3. Rule 17 (on which the Employes chiefly base their claim) was in no manner designed or intended to apply in such a situation.

4. Awards in antecedent cases fully support what was done in this situation.

5. The claim should be denied in its entirety as something not requiring negotiation or handling under the collective bargaining agreement.

These points will be discussed in the order shown.

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1. Less carload freight car lines have been changed from time to time down through the development of railroad transportation without question, specific instances of which will be given.

Development Of Present Mode Of Handling LCL Shipments

The Carrier in its **Statement of Facts** took a shipment originating at Chicago and followed it through to destination at Columbia, Virginia, to show by a simple illustration how less carload freight moves over this and other railroads of the country.

Such handling is in no manner new, but is as old as the industry itself. Problems attending such handling are in no measure new. It is plain that the least number of times any shipment has to be handled or transferred the better, and that is what railroads have strived for down through the years. This, coupled with the desire and necessity for expeditious handling, has meant that changes have had to be made from time to time down through the years in the interest of greater efficiency and better service to railroad patrons.

Ordinarily the Carrier would go into its old records and exhibit documents proving that less carload car lines have been changed down through the years as stated without conference or negotiation of any kind, but this would only make the record in this case unduly long, without helpful results, because the Employe representatives in their handling on the property have told the Carrier's representatives they know this has been done. It is not believed the Employes will deny this, and it is not believed that they will attempt to show a single instance in which this Carrier has ever conferred or negotiated with any organization in connection with such change in package car lines.

The Carrier will, however, in order that its statement will be supported, show several comparable situations on its lines which go to prove beyond doubt that the claim in the instant case is novel and without basis in existing agreement rule or past practice, the first of which is what happened in the getting of less carload freight through Chicago to connecting lines, or vice versa.

For many years it was the general practice for railroads having freight stations in Chicago to include freight for other connecting roads there in their own cars made on their Chicago freight station. When such freight arrived in Chicago it was put into a so-called trap car, and then switched from the one road to the other the same as any other railroad car would be switched. To illustrate, a piece of freight from a C&O point to a point on the Chicago & Northwestern was put into the C&O Chicago car for breaking bulk there. In Chicago freight house, all of the freight for the C&NW coming out of the different incoming cars was transferred

to a trap car for the C&NW, and this car was switched and handled in regular interchange with the C&NW. This sometimes required a number of days for getting the particular freight through Chicago. Later some improvement in the handling was made by trucking the freight between railroads in Chicago, but this was likewise slow and had many disadvantages.

Therefore, the improved method of handling became one of loading the freight on some transfer station short of Chicago, having that transfer station assemble the through Chicago freight from the many different cars into one car for direct through handling, the same as a carload shipment goes from one road to another between the same two Carriers in Chicago.

Originally, the C&O set-up was to load all such through-Chicago shipments on Peru, Ind., the next C&O terminal to the east of Chicago. There they were put together into cars for the western connecting roads, such as the C&NW, Burlington, Santa Fe, and Milwaukee. Thus, freight which had come to Chicago freight house was stopped off at Peru, and the Peru transfer force made the car for the C&NW through Chicago to Proviso, Ill.

The Employes well knew this was happening, and well knew that the force at Peru had to be increased to take care of the new volume of work placed on that point. The Employes at the same time knew the effect of this handling on the freight house force at Chicago, but no question was raised, because the Employes knew and understood this was part of the plan necessary for giving better railroad freight service; and they knew no rule of the Clerks' Agreement had been violated, because no rule had ever been included in such agreement to in any manner hamper or take from the Carrier the right to make such service re-arrangements to meet changed conditions.

The reverse was true in connection with shipments from the connecting lines at Chicago to the C&O. Instead of the western roads trapping their transfer freight to the C&O, it was arranged that they bill their freight for the C&O through Chicago to Peru. On the C&O at Peru, this freight was then loaded into appropriate cars for handling eastward from that point for the most advantageous dispatch. This likewise increased the force necessary at Peru, and the Employes knew this was taking place. While Peru and Chicago are on the same seniority territory for clerical employes, this had no fundamental effect upon the situation, and this will become plain from what follows.

Later, it was found that this plan had disadvantages, principally because Peru was such a small point from a standpoint of freight originated, and oftentimes cars were made there with a small amount of freight when the next larger station on the east (Cincinnati) was that day making a similar car for the same point. To further improve the situation, arrangements were then made to have the through-Chicago cars from other lines billed on Cincinnati, where they have been worked for breaking bulk for a considerable period. If the package car schedule be referred to again, it will be seen that six through-Chicago cars are received daily at Cincinnati for such working.

In the other direction, experience and study showed that it would be distinctly advantageous from a service standpoint to have Cincinnati (the last sizeable freight station to the east of Chicago) handle the transfer of through-Chicago shipments westward. If the package car schedule be looked at again, it will be seen that five cars are daily made at Cincinnati for handling through Chicago to the western lines.

Cincinnati freight station is on a separate seniority territory from Chicago and Peru, and no question of any kind was raised by the Clerks when these changes were made. When such changes were made the forces were adjusted to meet the conditions. Forces were put on where the work required, and were taken off with the decline in business at the other point, all of such adjustment of forces being handled the same as any other increase in volume of freight to be handled at the particular point would be met. The employe representatives knew such changes were being made, and discussed certain phases of the situation resulting therefrom in conference with the Carrier without even commenting on the Carrier's right to make such changes.

To illustrate: After the transfer work referred to above had gone from Peru to Cincinnati, the Division Chairman at Peru was complaining because the freight warehouse force had been cut to a foreman and two Group 3 employes. It was contended that this might not be enough men for handling what shipments would show up at Peru. The General Chairman of the Clerks discussed this situation with the Labor Relations Department, but in no manner raised question as to right of the Carrier to have the transferring done at Cincinnati instead of Peru. This shows clearly that the contention in the instant case is new and without foundation.

In order to still further show that car lines have to be frequently changed to give better service or meet changed conditions, information will be provided on the last change in a car line made by this Carrier.

The Southern Railway was making a car from Chattanooga, Tennessee, on the C&O freight station at Cincinnati, Ohio. This car was found to contain a considerable amount of freight for C&O points in Northern Michigan, and by having to transfer such freight at Cincinnati, unnecessary delay was occurring, because Cincinnati had to transfer such freight into a Grand Rapids, Michigan, car.

To give better service to this freight, the Southern was requested to put all of the Northern Michigan freight into one car and bill it on Grand Rapids, thereby completely eliminating transfer at Cincinnati, and such is the present handling as will be seen from the package car schedule made a part of this record.

This, however, did not stop the Southern car from coming to Cincinnati, because the Southern still loads freight from other points into a C&O-Cincinnati car. Therefore, two cars now serve instead of one, but the service is much improved.

It is this kind of thing which must constantly go on over the railroads of the country, in order to give proper service and meet competition of other forms of transportation, and nothing can be shown, so far as this Carrier knows, which requires negotiation of such car line changes on any railroad.

2. The parties knew when they made their current general agreement that such was the practice and custom, and no rule was embodied requiring conference or negotiation to continue what had always been done and understood as a managerial obligation, responsibility, and right.

It should be obvious that service to railroad patrons is something which should not be subject to negotiation under collective bargaining agreements with railroad employes. The Interstate Commerce Commission and state regulatory bodies protect the public interest in connection with such service.

The parties to the current general agreement for Clerks knew this when the agreement was negotiated to become effective January 1, 1945, and it is not believed the Employes will in the instant case argue that they did not know that the Carrier made changes in its scheduled package car lines from time to time to meet conditions as they arose. They certainly asked the Carrier for no rule having to do with such changes.

The Carrier will presently analyze all of the rules upon which the Employes seek to base the instant case, but it can be fairly said that the only rule which would have even remote connection would be Rule 17.

Rule 17 was not new to General Agreement No. 7. It had existed in substantially the same form in the prior agreement, and the Employes in explaining requested changes in no manner referred to changes in package car lines.

The Board has often said that the parties are bound to what was agreed to at the time of making their covenants. The Carrier says there was definitely no covenant in making the current general agreement (or any of the prior agreements) that it had to negotiate changes in package car lines, such as is involved in the instant case.

3. **Rules relied upon by the Employes.**

As set forth in the Carrier's Statement of Facts, the Employes have indicated they base their claim on Rules 1, 2, 3, 4, 6, 11, 14, 17, 18, 26, 37, 44, 46, 47, and 65. Such rules will be discussed in the order shown.

Rule 1

This is the scope rule. The Employes in handling on the property did not point out in what respect they contend this rule was breached. However, attention is called to the fact that none of the work of handling the less carload freight in question has been removed from employes under the Clerks' Agreement. It is all being performed by the regular freight station clerical forces at the other points, in line with which there has been no violation of this rule.

Rule 2

This rule provides that seniority may be exercised when vacancies occur or new positions are created. The Carrier advertised all new positions at Ashland and filled them fully in accordance with this rule, in line with which such rule has no other application in this case.

Rule 3

This rule covers the establishment and exercise of seniority. As all employes had seniority and used it in accordance with the rules applicable, the Carrier knows of no relationship this rule has with the issue in the instant case.

Rule 4

This rule declares that employes shall be in line for promotion in accordance with seniority where fitness is sufficient to fill the position, but as no question of this kind has been injected into the instant case, the Carrier knows of no applicability here.

Rule 6

Rule 6 provides how seniority districts other than General Office will operate. It is agreed that Huntington and Ashland are separate seniority districts, so that the Carrier knows of no contention this rule may have with the basic issue in this case.

Rule 11

This rule outlines how vacancies or new positions will be bulletined. As no question has been raised as to bulletining vacancies or new positions in this case, the Carrier knows nothing it can say beyond its position that this rule has not been breached in any manner.

Rule 14

Forms of bulletins and awards are provided by this rule, but as no positions other than those at Ashland are involved, about which there is no question, the Carrier knows of no proper connection. As earlier set forth, when positions were abolished at Huntington, the necessary procedural steps were taken, so that the Carrier does not understand that this can have any connection with the issue of the instant case.

Rule 17

This rule is plain in its intent and purpose. It enters to cover where a bona fide position is being transferred from one roster to another, or where a position is being transferred from one point to another on the same seniority territory.

In the instant case no transfer of positions is involved. Freight station forces go up or down according to business to be handled, and in the instant case the fluctuation was brought about by bona fide change in package car lines, so that not as many cars came to Huntington as formerly, and so that a greater number of package cars come to Ashland than previously.

However, it is pointed out that the clerical force at Ashland freight station has been greater than at present in many instances, because there was sufficient volume of traffic to justify the larger force.

Reasonable men will recognize that the parties in making Rule 17 could not possibly have had in mind that Rule 17 would be followed out every time a package car line is changed. The fact that Rule 17 has never been brought into question in this connection down through its existence is good proof that Rule 17 was never intended to apply in connection with such car-line changes.

The Carrier knows the Board has said that the language of the rule must stand for itself, and the Board has likewise said that the construction

the parties give to a rule over a considerable period shows what that rule was intended to do. The facts in this case warrant no conclusion but that Rule 17 is not applicable in connection with changes in car lines, so that there is no basis in this rule for a finding that the Carrier has violated the Clerks' Agreement in this case.

Rule 18

This rule has to do with reducing forces and abolishing positions. In conferences on the property the Employes have not pointed out how they contend this rule has been breached, in line with which the Carrier is not able to further comment.

Rule 26

Rule 26 covers seniority rosters. Preparation and posting are provided for, as well as correction, but as nothing of this kind is here involved, the Carrier cannot offer any further comment as to applicability in this case.

Rule 37

This rule covers absorption of overtime, and the Carrier knows of no manner in which this enters the instant case.

Rule 44

This rule covers maintenance of rates of pay. Nowhere in this case is there any indication that the Carrier has tried to evade proper application of rates of pay. In most cases the rates of pay at freight stations vary so as to conform to other rates of the same seniority territory. There has been no contention on the property that the Carrier failed to pay proper rates at either Huntington or Ashland.

Rule 46

Rates for new positions are provided for by this rule. The additional positions put on at Ashland were rated fully in accordance with this rule.

Rule 47

This rule provides that positions and not employes will be rated. Nowhere in this case can it be shown that the Carrier has attempted to rate employes instead of positions.

Rule 65

This rule covers procedure for change in the rules of the general agreement, but as no agreement change is involved, the Carrier does not know how this rule could be in any way involved.

The Carrier has shown by such analysis that there has been no violation of any rules upon which the Employes base this claim, or of any of the other rules of the Clerks' Agreement.

3. Awards in antecedent cases support what was done in this situation.

The Carrier finds two cases on which there are published awards of the Third Division involving package or less carload freight shipments of the nature involved in the instant case. They are Awards 4667 and 6587.

In Award 4667 the Board said:

> ". . . The controlling question for the Board to decide is whether the cars in question were assigned to and became work to be performed by the employes on the Wayne Junction seniority district. The undisputed facts are that these cars were destined for Wayne Junction and were not diverted elsewhere en route. They were placed in the Wayne Junction yard and the waybills were in the territory office; and when the Carrier determined the employes could not handle the backlog as quickly as desired, during their regular hours the cars were transferred to Willow and Noble Streets and Reading Transfer for handling. . . ."

This clearly distinguishes the instant case. The parties agree that no cars have been worked at Ashland which were destined to Huntington. All cars destined to Huntington were worked there. The whole question here is the right to bill cars to break bulk at Ashland instead of at Huntington.

In Award 6587 certain less carload or package cars which had been worked at Proviso were made on Milwaukee, Green Bay, etc.

The Board said:

> "The last paragraph of Rule 15 (consolidation of offices or districts) pointedly refers to the transfer of a 'special class of work' and does not deal in any respect with the use of overhead cars or the routing of traffic from the original loading point direct to destination or connection. . . ."

Therefore, the Board has already passed on the principle involved in the instant case—right of the Carrier to make overhead cars or route traffic, according to conditions, from the original loading point to destination or connection, without negotiation under the collective bargaining agreement as transfer of positions or work from one seniority district to another. The holding was that the Carrier **did not violate** the Clerks' Agreement in so doing.

Such holding was proper and should be upheld in the instant case, because it is well known that certain phases of work must be performed at different points from time to time according to conditions. Another example is weighing of cars on track scales.

Railroads have to maintain scales for weighing cars at many points in order to meet all conditions, but this does not mean that weighing of particular cars is exclusive to any point. In some instances cars are weighed at the point of origin for particular reasons. In other instances the weighing is done at the point of destination. In still other instances the weighing is done while other operations are being performed, such as on hump yards employing automatic scales.

There is no more justification for argument that the Carrier must forever bill less carload freight for transfer to a certain point than there is to say that the Carrier must delay cars or handle them inefficiently in order that they may all be weighed on scales at some particular point.

The awards in prior cases fully support what has been done in this case and justify a denial award.

5. This claim should be denied in its entirety as something not requiring negotiation or handling under the collective bargaining agreement.

The evidence is fully to the effect that the changing of car lines in this case is not something new, but is the same thing which has been done without question since the beginning of railroads.

Service requirements are plainly such that such changes cannot properly be subject to collective bargaining agreement, but must be carried out by Management as a managerial responsibility pursuant to the rendition of prompt and efficient freight transportation service.

Examination of the current collective bargaining agreement shows that there is no rule in any manner covering such change in car lines, so that such changes have not been made a matter of collective bargaining.

Prior cases before the Third Division show that what was done in this case was fully in keeping with well established railroad practices and requirements and is not in violation of the Clerks' Agreement.

This claim should, therefore, be denied in its entirety.

All data contained in this submission have been discussed in conference or by correspondence with the Employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The controversy now before us concerns the Huntington, West Virginia, and Ashland, Kentucky freight stations, two of the many such stations maintained by the Carrier to break package cars and sort the contents for further loading and shipment. The Huntington and Ashland stations are about 16 miles apart and in different seniority districts. Early in 1955, the Carrier enlarged its Ashland facilities and began to divert to Ashland cars formerly loaded to break bulk at Huntington. Cars from 22 different origins formerly billed to Huntington were, effective with this change, directed to Ashland. At the same time, the work of checking, unloading and transferring less-than-carload freight, moving in carloads from their points of origin, that was formerly performed by the Huntington employes, began to be handled at Ashland. During the spring of 1955, Carrier abolished ten clerical (Group 1) and thirteen Group 3 positions at Huntington, but established four clerical and five Group 3 positions at Ashland. These changes were accomplished unilaterally by Carrier and without consultation with the Brotherhood. The Huntington employes affected were not afforded an opportunity to follow their work to Ashland.

The Carrier maintains that the above-mentioned changes breached no provision of the controlling Agreement and emphasizes that they simply involved the elimination of a portion of the work at one point and the performance of more work at another. It points out that the station at which L.C.L. package cars are broken out is determined by Carrier in accordance with the volume and destination of traffic. The Carrier further insists that the employes in Huntington did not have exclusive right to this work and that it is its prerogative to have the work performed at the freight station that efficiency and economy dictate.

In our opinion, the real question presented by this record is whether or not the changes under consideration amounted to a removal of the work out of one seniority district and into another. Despite the Carrier's arguments to the contrary, we are satisfied that this question must be answered in the affirmative. The practical significance of this situation, the basic facts of which are undisputed, does not differ substantially from any case where the Carrier, for operational or other considerations, decides to withdraw work from the employes who theretofore had performed it and to assign it instead to employes in a different seniority district. There is no doubt but that the realistic and inevitable result of the changes, however they were accomplished, was to cause employes within the Huntington seniority district to lose work they had been performing to employes in another and entirely separate seniority district. The situation is to be distinguished from those where the work was actually abolished.

Rule 6 of the controlling Agreement, notably sections (c), (d), (e) and (f) thereof, provides that Ashland and Huntington are separate seniority districts that are not to be changed in the absence of agreement between the contracting parties. Those sections, considered together with Rules 1 (a) and (b), 3 and 17 (e), underline the importance of district seniority.

It is well settled that seniority is a valuable property right. See Award 4987. That right would be devoid of strength and meaning if it represented merely a paper designation and there was no work for its holders to perform. See Award 5078. The entire purpose and underlying spirit of the seniority provisions require that, in the interest of the employes' seniority, their statutory bargaining agent be consulted before any move of the type in question is made that will impair their valuable seniority rights. Accordingly, not even to consider the effect of the aforementioned changes with the Brotherhood constitutes a violation of Rules 1, 3 and 6 of the Agreement. To hold otherwise would be to encourage the emasculation of that Agreement. Manifestly, operational changes by the Carrier must be effected in a manner that is compatible with its contract commitments.

Consideration of evidence regarding past practice is not appropriate since the Agreement's provisions are sufficiently unambiguous on the point in question.

As to the argument that to sustain the claims would be to give the Brotherhood a veto over Carrier's operations, it should be noted that this is not a case where the Brotherhood declined to consider the changes and to meet with the Carrier in a bona fide attempt to lessen the impact of the changes upon the Huntington employes. The Brotherhood was not even consulted.

We cannot accept the Carrier's contention that to sustain the Brotherhood's position is tantamount to insisting that "once Carrier has certain

work performed at one point it must forever be handled at that point." All we hold in this case is that before making changes that will shift work out of one seniority district and into another to the obvious detriment of one group of employes, the Carrier must consult the appropriate bargaining representative of the employes affected in a bona fide effort to mitigate the impact of the changes upon those employes. In reaching this conclusion, we have considered the Agreement before us and not the equities of the situation. In our view, this requirement is basic and fundamental to the seniority rights prescribed by that Agreement. There is nothing in the requirement that is harsh, unreasonable or inconsistent with the duties and privileges of a Carrier.

Under the circumstances, the claims will be sustained. See Awards 6309, 4667 and 3964.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January, 1960.

DISSENT TO AWARD NO. 9193, DOCKET NO. CL-8754

Insofar as this dispute is concerned, Carrier maintains breakbulk operations at both its Huntington and Ashland freight stations, 16 miles apart in separate seniority districts, and on or about April 12, 1955, it changed, at their originating point, its consignment of certain cars to Ashland that had previously been break-bulked at Huntington. The changes in consignment of such cars was in exercise of Carrier's prerogative to direct its operations in the interest of efficiency and economy and resulted in a force reduction of 23 clerical employes at Huntington as opposed to a force increase of 9 clerical employes at Ashland.

This Award No. 9193 erroneously holds that Carrier's change in consignment of these certain cars at their originating point, for breakbulking at Ashland rather than at Huntington constitutes a violation of its Agreement with its Clerks in that it is a transfer of work from Huntington to Ashland (from one seniority district to another) without negotiation, de-

spite the facts that (1) there is no Agreement provision requiring that Carrier handle through any given point any stated quantity of freight in terms of quantity or class or commodity, and (2) the L.C.L. cars involved did not originate in the Huntington seniority district and were not billed or destined to that district for handling; hence their being consigned, at their originating point, for break-bulking at Ashland rather than at Huntington was not a transfer of this work from Huntington to Ashland. Obviously, for the Majority to so hold is to usurp the function and prerogative of Carrier to direct the detail of its operations when not in conflict with its Agreement commitments which clearly is not the case here.

While it readily appears that equity considerations troubled the Majority and strongly influenced its decision in this instance, this Board should have confined itself to interpreting the Agreement Rules as written; equity is not a proper subject for consideration by this Board.

For the foregoing reasons, among others, the undersigned Carrier Members dissent to the holdings of the Majority in this Award No. 9193.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. F. Mullen

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APPENDIX

Section Two

STATUTORY PROVISIONS

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STATUTE INVOLVED

45 USC § 153 NATIONAL RAILROAD ADJUSTMENT BOARD — Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided:

"NATIONAL BOARD OF ADJUSTMENTS — GRIEVANCES — INTERPRETATION OF AGREEMENTS

* * * *

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order

of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the dictrict court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

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APPENDIX

Section Three

ORDER AND OPINION OF THE DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT HUNTINGTON

FLETCHER H. HANSON, et al.,

Petitioners,

vs. CIVIL ACTION NO. 1061

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation,

Respondent.

ORDER

This cause came on for consideration of the Motion for Summary Judgment heretofore duly filed by the Respondent, which Motion was opposed by the Petitioners, and for consideration of Petitioners' Motion for Summary Judgment, which motion was opposed by the Respondent, and the Court having heard argument of counsel and considered written briefs, and being fully advised in the premises, for the reasons set forth in an opinion dated December 8, 1964, which is hereby ordered filed and made a part of the record in this action, the Court was of the opinion that there is no genuine issue of material fact for trial in this action and Respondent is entitled to judgment as a matter of law, wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Respondent's Motion for Summary Judgment be, and the same is hereby granted; IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioners' Motion for Summary Judgment be, and the

same is hereby denied; AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioners shall take nothing in this action, that the action be, and the same is hereby, dismissed with prejudice and removed from the docket of this Court, to all of which Petitioners object and except.

ENTER this 20th day of January, 1965.

Enter:

(s) SIDNEY L. CHRISTIE
United States District Judge

OPINION

This is an action by petitioners under the Railway Labor Act, 45 U.S.C.A. 151, seeking enforcement of Award No. 9193 of the Third Division of the National Railroad Adjustment Board, made the 18th day of January, 1960. The award stated that the transfer by the railway company of work from one seniority district to another without consulting the union violated the collective bargaining agreement. A Motion to Dismiss was previously made by the respondent railroad that this Court did not have jurisdiction on the grounds that jurisdiction of the cause was then within the National Railroad Adjustment Board and that the findings of the Board were too vague, indefinite and incomplete to be judicially enforced. In disposing of that Motion this Court found that it did have jurisdiction and that the findings of the Board were judicially enforceable. See this Court's opinion in *Hanson v. Chesapeake and Ohio Railway Company*, 198 F. Supp. 325 (S. D. W. Va., 1961). Now, both parties in this action, alleging that there is no genuine issue of material fact, have moved for summary judgment

pursuant to Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. As its grounds for summary judgment, respondent railroad alleges that the Board's decision is erroneous in holding that there had been a violation of the collective bargaining agreement and that it is unenforceable as a matter of law. If this position is sustained, it will be unnecessary to examine the petitioners' Motion or to consider the issue of petitioners' individual claims on their merits.

The standard of review in these award cases, found in Section 153(p) of the Railway Labor Act as amended, is as follows:

> "...Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ."

In reality, this means that the enforcement suit is a trial *de novo* on the merits of the claim. *Brotherhood of Railroad Trainmen v. Louisville & N. R. Co.*, 334 F.2d 79 (5th Cir. 1964): *Order of Railroad Telegraphers v. Union Pacific Railroad* 231 F. Supp. 33 (D. Colorado 1964). Cf. *Brotherhood of Railway and Steamship Clerks, etc. v. Atlantic Coast Line R. Co.*, 293 F.2d 753 (4th Cir. 1958). However, the findings and order of the Board, being adverse to the railroad, have the same effect as a shift in the burden of proof since the railroad, which is now appealing from the National Railroad Adjustment Board, has the burden to prove that the award was wrong. *Russ v. Southern Ry. Co.*, 334 F. 2d 224 (6th Cir. 1964).

The undisputed facts in this case briefly summarized reveal the following: During the months of March

and April, 1955, the Chesapeake and Ohio Railway Company changed its schedule covering package cars of less-than-carload freight whereby freight, which previously had been billed to Huntington, West Virginia, for unloading and transferring into other railway cars for further shipping, was under this new schedule to be billed to Ashland, Kentucky. The Huntington and Ashland stations are about sixteen miles apart and are in different seniority districts. As a result of this increase in bulk-transfer work at Ashland, nine new positions were established there. At the same time, due to the decrease of work at Huntington, the railway company abolished twenty-three positions there [ten clerical (Group 1) and thirteen laborer (Group 3)]. On July 15, 1955, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees filed a claim against the railway company stating that the collective bargaining agreement they had with it had been breached by the company in abolishing these positions at Huntington. Union and management were unable to settle the dispute so the brotherhood filed its claim with the National Railroad Adjustment Board's Third Division. At the initial hearing the Board was deadlocked so a Referee was added to the ten-member board. The relevant portions of the majority opinion are as follows:

> "In our opinion, the real question presented by this record is whether or not the changes under consideration amounted to a removal of the work out of one seniority district and into another. Despite the Carrier's arguments to the contrary, we are satisfied that the question must be answered in the affirmative. The practical significance of this situation, the basic facts of which are undis-

puted, does not differ substantially from any case where the Carrier, for operational or other considerations, decides to withdraw work from the employes who theretofore had performed it and to assign it instead to employes in a different seniority district. There is no doubt but that the realistic and inevitable result of the changes, however they were accomplished, was to cause employes within the Huntington seniority district to lose work they had been performing to employes in another and entirely separate seniority district. The situation is to be distinguished from those where the work was actually abolished.

"Rule 6 of the controlling Agreement, notably sections (c), (d), (e), and (f) thereof, provides that Ashland and Huntington are separate seniority districts that are not to be changed in the absence of agreement between the contracting parties. Those sections, considered together with Rules 1(a) and (b), 3, and 17(e), underline the importance of district seniority.

"It is well settled that seniority is a valuable property right. See Award 4987. That right would be devoid of strength and meaning if it represented merely a paper designation and there was no work for its holders to perform. See Award 5078. The entire purpose and underlying spirit of the seniority provisions require that, in the interest of the employes' seniority, their statutory bargaining agent be consulted before any move of the type in question is made that will impair their valuable seniority rights. Accordingly, not even to consider the effect of the aforementioned changes with the Brotherhood constitutes a violation of Rules 1, 3 and 6 of the Agreement. To hold otherwise would be to encourage the emasculation of that Agreement. Manifestly,

> operational changes by the Carrier must be effected in a manner that is compatible with its contract commitments."

Sustaining the claim of the brotherhood, the majority opinion concluded:

> "All we hold in this case is that before making changes that will shift work out of one seniority district and into another to the obvious detriment of one group of employes, the Carrier must consult the appropriate bargaining representative of the employes affected in a bona fide effort to mitigate the impact of the changes upon those employes. In reaching this conclusion, we have considered the Agreement before us and not the equities of the situation. In our view, this requirement is basic and fundamental to the seniority rights prescribed by that Agreement. There is nothing in the requirement that is harsh, unreasonable, or inconsistent with the duties and privileges of a Carrier."

Therefore, in this action for an order to enforce the Board's award, the issue for decision before this Court is whether there has been a violation of the collective bargaining agreement between the railway company and the union, or more specifically, whether a change in the railway company's freight car schedule is to be considered as a part of "management's prerogative" or to be considered as a violation of petitioner's seniority rights under the collective bargaining agreement.

The question is a novel one. We have not been cited to a court decision involving this particular issue, and our own research has failed to reveal any case where a similar situation was involved. Generally it may be said that management remains free to control its

business except as limited by the collective bargaining agreement. *Gunther v. San Diego & Arizona Eastern Railway Co.*, 198 F. Supp. 402 (S.D. Cal. 1961); *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 307 F2d 21 (2d Cir. 1962); *Texas & N.O.R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548; and *Beeler v. Chicago R. I. & P. Ry. Co.*, 169 F.2d 557 (10th Cir. 1948). Thus, the right to create and abolish positions, remove shifts, and change the methods and processes of work would remain with management subject only to the rights of the workers as contained in the agreement. Therefore, we must look to the collective bargaining agreement to determine whether the railway company has bargained away its right to make this freight schedule change without consultation with the union. The alleged violations of the agreement as found by the Adjustment Board have to do with Rules 1, 3, and 6. Rule 1 is the Scope Rule and its pertinent provisions are:

> "(a) These rules shall govern the hours of service and working conditions of all the following class of employes:
>
> > "Group 1 — Clerical Workers: Employes who regularly devote not less than 4 hours per day to the compiling, writing, and/or calculating incident to keeping records and accounts, transcribing and writing letters, rendition of bills, reports, statements, handling of correspondence, checking baggage, freight and material, and similar work, and to the operation of office or station mechanical equipment, requiring special skill and training such as typewriters, calculating machines, adding machines, bookkeeping machines, tabulating machines, accounting and timekeeping ma-

chines, statistical machines, dictaphones, key punch, recordak, and photostat machines, teletype (except teletypes used exclusively in the transmission of messages and reports and located in offices which are equipped with telegraph facilities), and other similar equipment or devices used in the performance of clerical work or in lieu thereof. Also station, store and warehouse general foremen and assistant general foremen; station, store, warehouse and merchandise pier foremen and assistant foremen; at Newport News, Virginia, top and bottom coal pier foremen and assistants, and sprinkler foremen; pursers and assistant pursers, chief clerks, assistant chief clerks, ticket sellers, managers of Zone Revision Bureaus, division storekeepers, stationary storekeeper, car distributors, traveling timekeeping accountants, assistant boatmasters, city ticket agents, assistant city ticket agents, service inspectors - Passenger Transportation Department, supervisors and assistant supervisors of the clerical craft or class, stationmasters and assistant stationmasters.

" * * * * * *

"Group 3—Laborers employed in and around offices, stations, storehouses, warehouses, and Newport News-Norfolk Steamer including scrap dock laborers (Stores Department), and those used to adjust overloads and/or transfer bad order loads at freight stations and where it has been the practice to use employes covered by this Agreement, porters, and matrons."

Rule 3 of the Agreement involving seniority is as follows:

"(a) Seniority is established and its exercise allowed as provided by the terms of this agreement. Seniority established hereunder is to be retained by the employe subject to the terms of this agreement while same remains in effect. The two parties signatory hereto have full authority to jointly reach a mutual, definite and final conclusion on any question affecting seniority held under this agreement.

"(b) Except as provided in Section (c) of this rule . . . , employes entering the service do not establish seniority until awarded a rank and file bulletined position, that is, a bulletin for a new position, permanent vacancy, or temporary position or vacancy, of 30 calendar days or more duration. Seniority will begin on the date the employe actually performs service on such bulletined position, subject to the provisions of Rule 25.

"(c) Subject to the provisions of Rule 25, Group 3 employes entering the service will establish seniority on the date they are assigned a new position, permanent or temporary vacancy, of 30 calendar days or more duration, except Group 3 employes entering the service used for extra service for 6 consecutive months will establish seniority on the roster in the department in which they perform extra service from date of first service during the 6 months' period.

" * * * * * * "

Rule 6 outlines the seniority districts thusly:

"(a) Seniority rights of employes in their respective groups in bidding on bulletined positions, and of Group 3 employes in applying for Group 3 new positions or vacancies, will apply as follows:

"First—To all employes on the roster in the department where the vacancy or new position exists on the seniority district.

"Second—To all employes in all departments on the seniority district.

" * * * * * *

"(c) Seniority districts shall not be changed except by mutual agreement between the representatives of the parties hereto.

"(d) Where Group 1, 2 and 3 work is performed in the various departments referred to herein, separate rosters will be maintained for each group.

"(e) Any change in the established rosters must be made by agreement of the parties hereto.

"(f) Seniority districts as referred to in this rule are as follows:

"Huntington District
West of Morris Creek Junction to Russell Yard limits, excluding Ashland Terminal, and including all intersecting branches, except Big Sandy and Lexington Subdivision.

"Ashland District—Big Sandy District
Ashland Terminal and east to and including Elkhorn City and west to and including Lexington."

In interpreting these collective bargaining agreements the Court, in *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954), stated,

"Where parties to a contract have deliberately and voluntarily put their engagement

> in writing in such terms as import a legal obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing."

Our Fourth Circuit has further held that these collective bargaining agreements are like other contracts and should be given a reasonable construction, not one which results in injustice and absurdity. *Atlantic Coast Line R. Co. v. Brotherhood of Ry., Etc.*, 210 F.2d 812 (4th Cir. 1954).

Reasonably interpreted, the various sections of the bargaining agreement involved here, in this Court's opinion, do not show that the railway company has bargained away its right to make the above-mentioned schedule changes. The Adjustment Board itself could not show that the company had bargained such right away. It instead looked to the result of the schedule change and held that since such change did in its practical effect result in the transfer of work from one seniority district into another, thus causing the employees in the Huntington district to lose work they had been performing to employees in another district, such change was a violation of petitioners' seniority rights and that the brotherhood should have been consulted before such change was made. The majority of the Board, however, seem to have overlooked the fact that consultation is only required when the matter in controversy is a proper subject for negotiation under the bargaining agreement. Here, as this Court interprets the agreement, the matter of making the schedule change was a prerogative of management and the railroad was, therefore, under no obligation to discuss it with the brotherhood.

Concerning the transfer of work, the railway company claims that there was no transfer from Huntington since under the new schedule the freight cars were never billed there, but rather to Ashland. It is apparent, however, whether you look upon the schedule change as a transfer of work or not, the majority of the Board have read something into the agreement that is not there. By illustration, Rule 1 merely shows that the collective bargaining agreement covers three groups of employees (clerical workers, office and station workers, and laborers), and that the hours of service and working conditions for the employees will be as set forth in the agreement. Rule 6 basically states that seniority districts shall not be changed without mutual agreement between the brotherhood and management. From the record before us, the Court is unable to perceive any change in seniority districts. Neither petitioners nor the Board have shown that the schedule change complained of has expanded, lessened, or otherwise changed the seniority district. Thus, in interpreting Rule 6 of the agreement, the inability of petitioners to follow their work to Ashland was not due to a violation of the agreement by the railroad, but rather due to the agreement itself, formed by both parties, prohibiting petitioners from going into another seniority district.

Concerning Rule 3, pertaining to seniority, it states how seniority is established and forfeited and the methods of attaining it. As previously mentioned, the majority of the Board felt that the transferring of work affected petitioners' seniority. However, although being contractual, seniority essentially means that the oldest man in point of service is given the choice of jobs, is the first promoted, and the last laid off. *Gunther v. San Diego & Arizona Eastern Railway Co., supra; Siaskiewicz v. General Electric Co.,* 166

F.2d 463 (2d Cir. 1948). It cannot rightfully be interpreted or said that seniority itself gives a man the right to perform work that does not exist; it is only a means of regulating among the workers their preferential entitlement to perform available work.

Thus, in interpreting these rules, the Board has in effect altered and amended the agreement. To read into this agreement, as the majority of the Board did, that the railroad schedule change or transfer of work should not have been made without first consulting the brotherhood is something that the Board lacked authority to do. *Hunter v. Atchinson T. & S. F. Ry. Co.*, 171 F.2d 594 (7th Cir. 1948). The Fifth Circuit, in *Thomas v. New York, Chicago & St. Louis R. Co.*, 185 F.2d 614, stated:

> "Although National Railroad Adjustment Board has jurisdiction under Railway Labor Act to hear individual's grievance it is not authorized to write a contract for parties nor to create substantive legal rights."

As further stated in *Shipley v. Pittsburgh & L. E. R. Co.*, 83 F. Supp. 722 (W. D. Pa. 1949),

> "An award before National Railroad Adjustment Board which alters, changes or amends a collective bargaining agreement is usurpation of power granted Board under Railway Labor Act to interpret such agreements."

It is interesting to note here the comments of the dissenting members upon the majority opinion. They reveal that, in reaching their opinion, the majority took into consideration matters dehors the contract which were not proper subjects for consideration. To quote from the minority opinion:

> "While it readily appears that equity considerations troubled the majority and strongly influenced its decision in this instance, this Board should have confined itself to interpreting the Agreement Rules as written; equity is not a proper subject for consideration by this Board."

In summary, this controversy would seem more appropriately a matter for negotiation to be worked out together by the brotherhood and management in amending or changing the collective bargaining agreement so as to cover future railway schedule changes rather than asking the Adjustment Board or the courts to make such alterations. Cf. *Gunther v. San Diego & Arizona Eastern Railway Co.*, supra.

So viewed, it is concluded that there is no genuine issue of material fact involved and that the bargaining agreement properly construed and interpreted was not not violated by the railway company as claimed by the petitioners. This conclusion is not in conflict with the prior decision of this Court (198 F.Supp. 325), for the import of that decision on Motion to Dismiss went only to the question of whether the Board's award was too vague to be the subject of judicial enforcement. The Court there held that it was not. The Court was not there concerned with whether the award was erroneous; that question was not there in issue. Here, on Motion for Summary Judgment, we consider for the first time the question of whether the Board misinterpreted the rules of the bargaining agreement and misapplied the law thereto. Here, we conclude that under a correct interpretation of the agreement there was no violation of its terms by the railroad, and this being so, the petitioners accordingly have no cause of action.

Summary judgment will accordingly be awarded the railway company; enforcement of the Board's award and summary judgment for petitioners denied.

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APPENDIX

Section Four

ORDER CONTINUING CASES

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ORDER FOR CONTINUING CASES

For reasons appearing to the Court,

It is ordered that cases Nos. 9906, 9910, 9947, 9961, 9962, 9965, 9966, 9967, 9968, 9970, 9978, 9980 and 9982, be, and they are hereby continued from the July Session, 1965, to the October Session, 1965, of the October Term, 1965. June 9, 1965

/s/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed June 10, 1965
Maurice S. Dean, Clerk

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APPENDIX

Section Five

JUDGMENT OF COURT OF APPEALS

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Richmond, Virginia

JUDGMENT

HON. HERBERT S. BOREMAN, *Circuit Judge*

HON. ALBERT V. BRYAN, *Circuit Judge*

HON. SPENCER BELL, *Circuit Judge*

No. 9962

FLETCHER H. HANSON, *et al., Appellants,*

vs.

The Chesapeake and Ohio Railway Company, a Corporation, *Appellee,*

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington, Sidney L. Christie, District Judge.

Robert O. Ellis for Appellants, and Edwin W. Conley, (Huddleston and Bolen, on brief) for Appellee.

Per Curiam:

Upon consideration of the briefs, oral argument and entire record, we find no error.

Affirmed

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APPENDIX

Section Six

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT of CERTIORARI

No.....

October Term, 1965

FLETCHER H. HANSON, *et al., Petitioners*

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for Petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 3rd, 1966.

/s/ EARL WARREN
Chief Justice of the United States

Dated this 20th day of January, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1170

FLETCHER H. HANSON, ET AL, *Petitioner*,

vs.

THE CHESAPEAKE AND OHIO RAILWAY, COMPANY, a corporation, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation

IN OPPOSITION

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April 25, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1170

FLETCHER H. HANSON, ET AL, *Petitioner*,

vs.

THE CHESAPEAKE AND OHIO RAILWAY, COMPANY, a corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation IN OPPOSITION

OPINIONS BELOW

The citation for the opinion of the District Court has been presented in the petition. However, the Federal Reporter citation for the memorandum decisions of the Court of Appeals which was not given in the Petition is 351 F.2d 953 (1965). The opinion of the District Court is set out in the Appendix to the Petition in Section Three, while the judgment of the Court of Appeals is set out in such Appendix in Section Five.

JURISDICTION

The jurisdictional grounds are set forth in the Petition.

QUESTIONS PRESENTED

While petitioners are at liberty to delineate the questions in their petition as they see fit, the respondent Railway Company does not agree that the questions presented by the petitioners are at issue in this case. When fairly stated the questions are as follows:

1. Whether Award No. 9193 of the Third Division, National Railroad Adjustment Board is invalid, erroneous and unenforceable.

2. Whether the Railway Company would be denied due process of law under the Fifth Amendment to the United States Constitution if no review whatsoever was allowed as to the non-money award part of Award No. 9193 of the Third Division, National Railroad Adjustment Board.

3. Whether, even under a valid award, petitioners on the record of the case are barred from any money recovery herein because their claims have either been fully paid and satisfied or because they were not adversely affected by displacement as a result of the reduction of work forces at the Railway's Huntington, West Virginia freight station.

STATUTE INVOLVED

The pertinent statute is the Railway Labor Act, particularly Section 153 of Title 45 U.S.C.

STATEMENT OF THE CASE

This controversy grows out of action taken in early 1955 when in the interest of economy and efficiency the Railway Company exercised its managerial prerogative and, in the vernacular of railroading, changed its "car lines" for the handling of "package cars" of "LCL" freight. In the railroad industry

pieces of less-than-carload (LCL) freight moving to the same general geographic area are combined into carload lots (package cars) and moved over predetermined routes (car lines) according to regular schedules devised and revised as the amount of freight fluctuates to a centralized freight depot where the package cars are unloaded, sorted and the freight combined with the contents of other package cars from other areas into a car going to the city of ultimate destination. Such a freight depot where this reassembling process is carried out is called a "break-bulk" point. Since the beginning of railroading as LCL business has fluctuated and the needs of customers varied, the railroads have found it necessary to create new break-bulk points, abolish others, change car lines, and revise their schedules for breaking bulk on LCL shipments. Railroad management always made the decision as to which stations would "break" out package cars; unions have never made that managerial decision. Particularly since over-the-road trucking companies have eroded into railroads' LCL freight business, railroads have found it necessary to curtail operations in some break-bulk points and consolidate business elsewhere. LCL business has dwindled on the C&O to the point that pursuant to authorization of the Interstate Commerce Commission and the West Virginia Public Service Commission, the Railway Company now handles only carload lots in West Virginia and does no loading or unloading of any less-than-carload shipments. It follows that there are now no break-bulk operations either.

As a part of this constant adjustment of LCL car lines, the Chesapeake and Ohio Railway Company revised its package car schedule effective March 22, April 1, 4 and 18, 1955, at various points of origin (Petition, Appendix, Section One, p.23) which had the ultimate result of fewer package cars coming to Huntington, West Virginia, for break-bulk handling than had previously been the case with a consequential abol-

ishment of 23 job positions in Huntington. In March April and May, 1955, because of an increase in LCL break-bulk work at the freight depot in Ashland, Kentucky, 16 miles from Huntington, nine new positions were created in Ashland. The first new position came March 1, 1955, (Petition, Appendix, Section One, p.25) while the first schedule change came March 22, 1955. No position was abolished in Huntington until April 1, 1955.

By virtue of collective bargaining agreements, all freight-handling work done on the Railway Company's lines had for many years been handled exclusively by members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, commonly known as the "Clerks Union." Under those agreements various seniority districts were established, and it so happens that Huntington is in one seniority district while Ashland is in another. In 1955 the Railway Company and Clerks Union had in effect their agreement No. 7 dated January 1, 1945, which took the form of a printed booklet and is in the record as an exhibit to the affidavit filed in support of the Railway Company's Motion for Summary Judgment. After the 1955 change in schedule, all package cars which came to Huntington continued to be handled by Huntington seniority district Clerks Union personnel. No cars came to Huntington and then were transshipped to Ashland for handling, so that actually there was no transfer of work from the Huntington seniority district to the Ashland district.

Although prior collective bargaining agreements containing the same provisions, insofar as is pertinent here, had been in existence between the Railway Company and the Clerks Union for many years, and unilateral changes in the schedule and routes of LCL package cars had been made many times by the railroad with resultant changes in work forces and no

protests had ever been filed on the part of the Clerks Union, on this occasion that Union took the position that the 1955 change in car line schedule and concomitant diminution of work in Huntingon violated their collective bargaining Agreement. The Union filed a claim with the National Railroad Adjustment Board pursuant to the Railway Labor Act, 45 U.S.C.A. 151 *et seq.*, governing disputes involving the interpretation of an existing contract—a "minor dispute" in railroad parlance, as defined in *Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). After a deadlock among the 10 members of the Board's Third Division, a referee was brought into the case. By order of January 18, 1960, upon a 6-5 vote, it was held that the Railway Company's action violated Rules 1, 3 and 6 of the collective bargaining Agreement and the Board ordered that adversely affected employees should be compensated therefor.

While of the strong opinion that the Board's order was an invalid, erroneous, unenforceable extralimitary decision, as a means of seeking labor peace and in an attempt to avert litigation the Railway Company paid all employees who were conceivably adversely affected by the abolishing of the 23 positions in Huntington. The Railway Company took the work records of the 23 incumbents of the abolished positions and paid them for any lost time or pay differential between what they actually earned and what they would have earned at the rate called for on the position they held prior to its abolishment. Since those 23 men "bumped" or displaced persons with junior seniority holding other positions and those displaced persons in turn displaced other younger employees in a chain reaction, under this method of computation a total of 59 employees at Huntington were found to have incurred wage losses by reason of the 1955 change of car lines. The Railway Company paid those 59 persons a total of $59,104.95, after the manner of ascertain-

ing which employees were affected and the method of computation was discussed with the Clerks Union and the Union found it agreeable. Five of the petitioners herein shared in those payments but in this action claim additional sums. Of the remaining 11 petitioners here, the record shows one was dismissed from Railway service by reason of disciplinary action and not by reason of the cutback in forces, others were on "cut-off" status, having been previously laid off so that they were not working for the Railway Company in early 1955, while the remainder received as much money on other jobs as could have been earned had the 23 positions not been abolished, so that none of the dissident petitioners were adversely affected by the abolishment of the positions.

Upon the institution of this enforcement action by the 16 individual petitioners claiming to be beneficiaries of the NRAB award, the Railway Company moved to dismiss the action on the grounds that the Board's decision in this case, Award 9193, is so vague and indefinite that it is inadequate as a matter of law to vest jurisdiction in the courts. The trial court overruled that motion and wrote in explanation thereof an opinion reported in 198 F. Supp. 325. Thereafter the Railway Company filed its Motion for Summary Judgment supported by an affidavit explaining the undisputed facts of the case and attaching as an exhibit the Clerks Union Agreement. This motion for summary judgment (see Appendix this brief, p. 1) was based upon the following:

1. The award is invalid, erroneous and unenforceable.

2. The claims of five petitioners, Masterson, Bowman, Scragg, Maynard and Taylor were barred because fully satisfied and settled.

3. The eleven other petitioners were not adversely affected by displacement as a result of the

reduction of work forces at the Railway's Huntington, West Virginia freight station and, consequently, are not entitled to recovery.

The Railway Company accompanied its Motion for Summary Judgment with an affidavit of its Assistant Vice President-Labor Relations explaining the railroad industry's historic custom and practice of adjusting car lines to change break-bulk points on LCL package car shipments as traffic volume varied, and attached the complete record of the NRAB award, including copies of the exhibits introduced before the Board and a copy of the Agreement of January 1, 1945. The affidavit further explained the method of payment to the 59 affected employees who were paid by reason of the award and set forth the work record of the various petitioners showing that none of them were adversely affected by the abolishment of the 23 positions in Huntington. No factual issue was set up by the petitioners through any fact-containing counter-affidavit. The Motion for Summary Judgment with the pertinent portions of the affidavit appear in the Appendix of this brief at pp. 1, 2, the exhibits appear in the record on appeal in this case, being too voluminous to practicably be printed in the Appendix. Petitioners made no claim below that there are factual issues outstanding and can hardly controvert the facts in the affidavit now, for it has been held, "to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute. * * *" *Zoby v. American Fidelity Company*, 4 Cir., 242 F.2d 76, 80 (1957).

The District Court granted the Railway Company's motion for summary judgment holding in effect that the award was invalid, erroneous and unenforceable. The Court of Appeals affirmed in a per curiam opinion and ruled that "Upon consideration of the briefs, oral argument and *entire record*, we find no error." (Italics ours) 351 F.2d 953 (1965).

ARGUMENT

I. THE DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GUNTHER V. SAN DIEGO & ARIZONA EASTERN RAILWAY CO.* ..... U.S. ....., 86 S.CT. 368, 15 L.ED.2D 308 (1965) AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Contrary to the argument of the petitioners, the decision below does not conflict with the *Gunther* case. The circumstances of the case developed on the record here are not the same. *Gunther* involved an award of the National Railroad Adjustment Board, holding that a railway engineer was wrongfully removed from service and, because of such wrongful removal, should be reinstated with back pay. There it was determined that the basic grievance was the removal from service, while the reinstatement with pay aspect of the case was regarded as a money award. Accordingly, it was ruled that the District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit must accept the Adjustment Board's ruling on the merits of the wrongful removal issue with the money award being left to further proceedings before the District Court.

Although this Court seemed to say that a Board decision, other than as to the money award part, was to have the same finality that a decision of an arbitrator would have, it was not said nor held that a decision of the Board was to be regarded with more finality than an arbitrator's decision or with absolute finality. Actually, this Court, itself, exercised a right of review by carefully scrutinizing the Board's decision after which it commented at 86 S.Ct. 368, 371 that "* * * *Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason.* * * *" (Emphasis added). This language clearly indicates

that the non-money part of the award of the Board is not to be regarded as totally sacrosanct and further shows that the courts will be allowed to apply much the same test as that referred to by Judge Holtzoff in *In Re Certain Carriers; etc. Represented by Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific Railroad*, D.C.D.C., 248 F.Supp. 1008, 1013 D.C.D.C. (1966) in connection with Section 159 of the Railway Labor Act, that is, whether the Board "exceeded its power, committed error of law or acted arbitrarily or capriciously."

This is consistent with the national policy favoring private contractual arbitration recognized under Section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185 in the trilogy cases of *United Steel Workers of America v. Warrior & Gulf*, etc. 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343; 4 L.Ed.2d 1403 (1960); and *United Steel Workers of America v. Enterprise W. & C. Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960). For even in those cases this Court while favoring the expertise of the arbitrator and the law of the shop did not forclose judicial intervention. In *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the opinion of the Court said:

> "* * * Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In *Gunther* there was a factual determination to be made by the Board as to whether the engineer was physically fit and there were definite provisions in the contract calling for a hearing before suspension or discharge could take place. See *Gunther v. San Diego & Arizona Eastern Railway Co.*, D.C.S.D. Cal., 198 Fed.Supp. 402, 422 (1961). In this case now before the Court, the Board stated that the basic facts are undisputed and said that the agreement was so unambiguous that consideration of evidence regarding past practice favoring the action of the carrier was not appropriate. Petitioner's Brief, Appendix, Section One, p. 34. So, no factual determination as such was made and the so-called expertise of the Board in railroad matters and customs went unused when past practice was ignored by the majority of the Board who really made only a legal determination as to the meaning of admittedly unambiguous contract language. Yet, the majority pointed to no language in the contract supporting its view and was accused by the minority of not only failing to confine itself to the contract but of imposing its own will to re-write the contract agreed upon by the parties. Petition, Appendix, Section One, p. 36.

That the Board did re-write the contract is manifest. There is no dispute that the abolishing of positions in Huntington came as a result of the change of the car line schedule governing package car LCL freight in early 1955 mentioned above. No claim is made that in the mechanics of abolishing those jobs, and in handling the subsequent "bumping" by the incumbents of those petitions into other positions, that any violation of the Agreement occurred; on the contrary it was the contract which vouchsafed the right to exercise seniority and "bump" men with fewer years experience to do the remaining work in Huntington. There is no claim that any package cars came to Huntington and were then transshipped to Ashland in violation of the Agreement, but rather all package cars

which came to Huntington after the change in schedule were worked by Huntington seniority district employees. Thus the primary question is whether the Company-Union Agreement forbade the Railway Company's inaugurating the change of its car lines. The NRAB award cited no specific language of the Agreement which was said to have been violated. Likewise counsel for the petitioners could point to no sentence of the Agreement which was broken, and after a thorough study of the entire Agreement the District Court held that there had been no violation in the abolishment of the 23 positions wherefore petitioners could not, even if adversely affected, maintain an enforcement action thereon.

The majority opinion of the Third Division of the Board speciously reasoned that the Railway Company's unilateral change of car line schedules violated three sections of the Company-Union Agreement: "not even to consider the effect of the aforementioned changes with the Brotherhood constitutes a violation of Rules 1, 3 and 6 of the Agreement." (Petition, Appendix, Section One, p. 34). The District Court considered each of those three sections, quoting the contract language thereof (Petition, Appendix, Section Three, p. 7a-10a), in light of the undisputed evidence before it and could find no such violation.

Rule 1 of the Agreement (Petition, Appendix, Section One, p. 3) is entitled "Scope" and merely sets forth which employees are covered: "These rules shall govern the hours of service and working conditions of all the following class of employees:" going on to subdivide in what is called "Group 1—Clerical Workers" those who keep records, transcribe letters, render bills, operate typewriters, accounting machines, etc. while "Group 3" encompasses laborers employed around offices or stations, such as porters or janitors. Nothing in that Rule guarantees that there will be any work available to any persons in those classifications, but

the Rule only says that when there is work of that type it is to be performed only by persons covered by this Agreement.

Rule 3, (Petition, Appendix, Section One, p. 4) is entitled "Seniority" and recognizes that:

> "Seniority is established and its exercise allowed as provided by the terms of this Agreement. Seniority established hereunder is to be retained by the employe subject to the terms of this Agreement while the same remains in effect."

In other words, seniority is acknowledged to be purely a contractual matter—just as the courts have always held in dealing with railway labor questions: "Seniority among railway workers is fundamentally and wholly contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right." *Colbert v. Brotherhood of Railroad Trainmen*, 9 Cir., 206 F.2d 9, 13 (1953), certiorari denied 346 U.S. 931, 74 S.Ct. 320, 98 L.Ed. 422. Or as termed in *McMullans v. Kansas, Oklahoma and Gulf Railway Co.*, 10 Cir., 229 F.2d 50, 53 (1956), certiorari denied 351 U.S. 918, 76 S.Ct. 710, 100 L.Ed. 1450, "Seniority among railroad employees is contractual and does not arise from mere employment." Rule 3 goes on to set out in detail when and how an employee establishes seniority and how such seniority is to be considered in "bidding" for vacancies or "bulletined" positions. In essence this section or Rule does no more than say, as the lower court pointed out, "seniority essentially means that the oldest man in point of service is given the choice of jobs, is the first promoted, and the last laid off." (Petition, Appendix, Section Three, p. 12a).

Rule 6, entitled "Seniority Districts—Other than General Office," (Petition, Appendix, Section One,

p. 5) establishes the geographic limits of different seniority districts and in effect says that when there is an opening, preference will be given (after employees of the particular department involved) to employees of that district. Subsection (c) says: "Seniority districts shall not be changed except by mutual agreement * * *." Since Ashland and Huntington are in separate districts created by that Rule, when the volume of work at Huntington decreased, the Railway Company could not order the incumbents of the abolished positions to go to Ashland, for they would lose all their Agreement-protected seniority. There was no change of territorial boundaries of districts in contravention of Subsection (c); as the District Judge cogently commented in holding Rule 6 was not violated, nothing in the record has "shown that the schedule change complained of has expanded, lessened, or otherwise changed the seniority district." (Petition, Appendix, Section Three, p. 12a).

Taking these Rules separately or collectively, it can be seen that the District Court was irrefragably correct in holding that what transpired in early 1955 did not violate the Agreement. The Board's majority opinion tenuously rested on the principle that "seniority is a valuable property right." If it is understood that seniority is always a child of contract, and therefore necessarily limited and governed by the contract, we take no issue with that statement. So long as there is work to be done at a particular station, factory, mine, etc. it is a valuable right to have first chance to do that work because of seniority earned through the years pursuant to a collective bargaining agreement. But when there is no work to do at that point, seniority is of little value. For instance, there are thousands of unemployed coal miners in West Virginia who hold seniority with mining companies, but because of mechanization and depletion of the coal seam, there is no work for them, so their seniority is of no value. Similarly there were many persons hired by

the railroads of this country during the peak of wartime activities who hold some seniority but have no jobs because of post-war cutbacks and dieselization.

The NRAB Third Division's majority opinion let its concern with *seniority per se* becloud the fact that nothing in the Agreement of January 1, 1945, dealing with seniority or any other subject gave persons on the seniority roster at Huntington an exclusive right to continue doing the same break-bulk work for time immemorial. The Agreement spelled out in detail how apportionment would be made of such work as there was to be done in Huntington but that Agreement in no way obligated the Railway Company to provide jobs at Huntington forever by bringing break-bulk work into Huntington—yet that would be the effect of the majority's finding that the Agreement was breached.

In an effort to sidestep this effect and justify its erroneous and arbitrary decision, the majority opinion in Award 9193 said: "All we hold in this case is that before making changes * * * the Carrier must *consult* the appropriate bargaining representative of the employes affected in a bona fide effort to mitigate the impact of the changes upon those employes." (Emphasis added). In the first place, the Agreement nowhere requires management to "consult" the Union before making managerial decisions. Secondly, under that language, the majority is saying that if it had "consulted" with the Union, even though the Union refused to agree to the change of package car lines, the Railway Company could then make those changes with impunity in which event even the majority would admit there was no violation of this Agreement. Such reasoning cannot be sound, for either the Union has an Agreement-established right to veto the Railway Company's contemplated alteration of car lines, which we deny, or it had no such right. There is no place for a middle ground requiring futile "consultation."

The law will not require a futile act, and it would be obviously most futile to require consultation with the Union in a matter, after which the Company has the right to ignore the Union's position. This incongruity merely points up that the Union had no right to complain of the Railway Company's action and the majority opinion cannot withstand the light of judicial scrutiny.

The law is well settled that the approach to be taken in interpreting railroad collective bargaining agreements is that management retains and reserves all rights that it has not clearly bargained away in the agreement. Historically the common law recognized the prerogative of management to hire and fire, shift work, abolish positions, etc. as business reasons dictated. It has long been established, as Judge Murrah said in *Beeler v. Chicago R. I. & P. Ry. Co.*, 10 Cir., 169 F.2d 557, 560, (1948) certiorari denied 335 U.S. 903, 69 S.Ct. 407, 93 L.Ed. 437, of the Railway Labor Act:

> "The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process. Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginia R. Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. Cf. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352."

To the same effect see also *Thomas v. New York, Chicago & St. Louis R. Co.*, 6 Cir., 185 F.2d 614 (1950) where the Sixth Circuit affirmed a district court's denial of enforcement to an NRAB award.

Since the common-law right of management to run its business as it sees fit, to abolish jobs, and adjust its work force as it desires still prevails untrammeled so long as management has not bargained away those rights in a collective bargaining agreement, and inasmuch as nothing in the Agreement in any way impinges upon the Railway Company's managerial right to change car lines, it is manifestly clear that the decision of the Board was arbitrary, capricous and contrary to law.

Petitioners did not point out and have not pointed out any language of the Agreement which gives them rights in perpetuity to have LCL break-bulk freight work brought to them in Huntington. The obvious reason is because there is no such language in the Agreement, but rather the right to change schedules as business needs dictate is one of the rights reserved to the Railway Company because it was not bargained away in the Agreement.

Moreover, there actually was no transfer of work from Huntington to Ashland—or for that matter to Richmond or Clifton Forge, Virginia, which points also were used as break-bulk stations after the 1955 schedule change (Petition, Appendix, Section One, p. 23)—but thereafter LCL work just was no longer brought to Huntington from the originating cities affected. The schedule change told B&O, Pennsylvania, Southern, and other railroads, as well as C&O's own station agents in places like Detroit, Michigan, that thereafter they were to send package cars to Ashland, Clifton Forge and Richmond. Since those package cars after that change never came to Huntington, it cannot accurately be said that the contents of those cars were "transferred" to Ashland or Richmond, yet that was the argument of the Union which was accepted by the majority of the Board.

But even if the facts in this instance be viewed as a transfer of work from one seniority district to

another, the District Court correctly divined that such action did not violate the 1945 Agreement. The Board's interpretation of that Agreement interpolated into it a provision sometimes found in such agreements but which was significantly absent in this instance. *Westchester Lodge 2186, Brotherhood of Railway & Steamship Clerks, etc. v. Railway Express Agency, Inc.*, D.C.S.D. N.Y., 218 F.Supp. 187 (1963) modified 2 Cir., 329 F.2d 748 (1964) concerned an agreement containing the following language:

> "Positions or work involving a position may be transferred from one seniority district to another after conference and agreement between the management and the duly accredited representatives of the employes. Employes may follow their position or work when same is transferred from one seniority district to another."

Whatever effect such a paragraph might be said to have with regard to the Railway Company's actions of 1955, if it had been in the Agreement here, the Board slipped into egregious error and completely exceeded its jurisdiction when it in effect inserted such a paragraph in the 1945 Agreement. Such a paragraph might be a proper subject for the Clerks Union, as representatives of the employees, to seek to negotiate with the Railway Company for a new Agreement, but it was not a proper item for the Board to attempt to place in the 1945 contract by interpretation.

No car which was loaded and billed to Huntington was diverted to Ashland, and the Clerks Union members have worked every car that was ever sent to Huntington. The whole difference betwen the parties in this instance is the petitioners' claim that the Railway Company had to continue sending cars to Huntington, while the Railway Company says, with logic and authorities supporting it, that the Union contract of

1945 only gives the Clerks Union members the right to work whatever freight handling there was to be done in Huntington and did not obligate the Railway Company to bring work to Huntington.

It follows, then, that the lower court was correct in denying petitioners' motion for summary judgment and in granting the Railway Company's motion, since the NRAB order attempted to read something into the Agreement that was not there. It has been pointed out on several occasions in considering NRAB awards that the Board cannot write a new contract for the parties under the guise of interpreting their collective bargaining agreement. As aptly expressed in *Hunter v. Atchison, T. & S.F. Ry. Co.*, 7 Cir., 171 F.2d 594, 599 (1948), "In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract * * *" which the court stated made the Award "void because the Board exceeded its authority." See also authorities to same effect cited by the District Judge in his opinion. Petition, Appendix, Section Three, p. 13a.

Consequently, the Board acted arbitrarily and capriciously and, in the words of *Enterprise*, wrongfully and illegally dispensed its "own brand of industrial justice." The lower courts were clearly correct in granting summary judgment and refusing enforcement of the invalid award. The decision is entirely in keeping with *Gunther* and with the National Labor policy decisions recognized by this Court. Although it is plain that the federal courts are, under *Gunther* and other decisions of this Court, empowered to refuse enforcement of an award wherein the Board exceeds its authority, as is the case here, it must now be pointed out that if such is not the case, then serious constitutional objections involving denial of due process of law under the Federal Constitution are raised.

The Adjustment Board is a public agency, not a private go-between. *Washington Terminal Co. v. Boswell*, D.C. Cir., 124 Fed.2d 235, 244 (1941) affirmed 319 U.S. 732, 63 S.Ct. 1430, 87 L.Ed. 1694 (1943).

In *St. Joseph's Stockyards Co. v. U.S.*, 298 U.S. 38 at 51, 56 S.Ct. 720, 80 L.Ed. 1033 (1936), Mr. Justice Hughes delivering the opinion of the Court said:

> "* * * When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitarily * * *."

And in a concurring opinion in the same case, Mr. Justice Brandeis, 298 U.S. 38, 77 declared:

> "* * * When dealing with constitutional rights (as distinguished from privileges accorded by the Government, United States v. Babcock, 250 U.S. 328, 331) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it * * *."

Turning specifically to the Railway Labor Act, the recital in Section 3, First (m) saying that the award of the Adjustment Board is final and binding, does not preclude judicial review of the validity of the award. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 720, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945).

Courts "are invested with sufficient appellate jurisdiction over the Board to protect * * * from a denial of due process." *Ferro v. Railway Express Agency, Inc.*, 2 Cir., 296 Fed.2d 847, 852, 853 (1961) and cases cited therein. Even *Parker v. Illinois Central Railway Co.*, D.C.N.D. Ill., 108 Fed.Supp. 186 (1952) relied on by petitioners at page 9 of the Petition, held that where the award is not supported by substantial evidence, "this court would have the power to set it aside. To that extent, the award is not 'final'." It would naturally be assumed that these safeguards are inherent in the *Gunther* decision for to assume the opposite would be to say that the case was bottomed on an unconstitutional basis—an absurdity! There is clearly no conflict between *Gunther* and the instant case. Too, any conflict which may have existed between the circuits as to matters upon which *Gunther* is controlling was resolved at the time *Gunther* was decided and, as of now, there is no conflict between the circuits and no need for further clarification to be made by this Court.

Furthermore, it must be remembered that the Railway Company, while not admitting the validity of the award, paid a total of $59,104.95 to fifty-nine employees by reason of the award to achieve good labor relations. The manner of determining which employees were affected and the method of computation was discussed with the Clerk's Union and the Union found this agreeable. See uncontradicted affidavit of C. E. Weaver, Jr., Appendix, this brief, p. 10. While this action by the Company did not prejudice its rights in this case and was entirely in keeping with the principle that one can pay a judgment and still appeal therefrom [Cahill v. New York, N.H. & N.R. Co., 351 U.S. 183, 76 S.Ct. 758, 100 L.Ed. 1075 (1956)], it shows that the dispute in this case is of limited significance and has no far reaching consequence or effects on the continuing labor relations between Company and Union and the national labor peace. There

is nothing here that affects anyone except the litigants under the peculiar circumstances of this case.

II. EVEN UNDER A VALID AWARD THESE PETITIONERS ARE NOT ENTITLED TO RELIEF.

Even if the NRAB order in this case were correct and if it could be said that the Railway Company violated the 1945 Clerks Agreement when it changed car lines, the record demonstrates full handedly that these 16 petitioners still are not entitled to recover. The facts set forth in the affidavit filed in support of the Railway Company's Motion for Summary Judgment (Page 1, Appendix to this brief) which were not contradicted by any factual counteraffidavit show that none of the petitioners was adversely affected by the 1955 change. As fully described therein, the records of the Railway Company show that five of the petitioners were paid in 1960 for every hour they missed or any wage differential lost by reason of the 1955 alteration of package car schedule. One petitioner was fired for disciplinary reasons, to which he took no appeal, and eight were already "cut-off" hence they had no job to lose by the abolishment of positions. Another's job was abolished for an entirely different reason, and Hanson earned as much on other jobs for the Railway Company as he could have earned on the job that was abolished.

Clearly there was no disputed issue of material fact because Petitioners themselves also moved for summary judgment. Then, too, the District Court determined in an earlier opinion in 198 F.Supp. 325 (D.C.S.D. W. Va. 1961) that jurisdiction did not lie with the National Railroad Adjustment Board and found that there was no need for further clarification or interpretation of the award by the Board. And, of course, in any event, contrary to Petitioners' argument at page 6 of the Petition, the burden was on Petitioners to seek further interpretation. See *Koel-*

ker v. Baltimore and Ohio Railroad Company, 140 F.Supp. 887 (D.C.E.D. Penna., 1956).

There is ample authority substantiating the Railway Company's method of computing losses of the affected employees, which limited any possible recovery to the amount paid the 59 employees. In *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 10 Cir., 338 F.2d 407, 409-410 (1964) certiorari denied 33 L.W. 3347, an action involving enforcement of an NRAB award, the court elucidated:

> "We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R. R. v. Brotherhood of Ry. Clerks, 4 Cir., 210 F.2d 812, 815 * * *."

New Orleans Public Belt R. Com'n. v. Ward, 5 Cir., 195 F.2d 289 (1952) affirmed an NRAB award for time lost, "except that the amount thereof should be less any amount earned in any other employment during the time in question." Similarly in *Brimmer v. Pullman Co.*, D.C.E.D. Mo., 49 Commerce Clearing House Labor Cases, Case 18984, page 31,477 (1964) the court denied enforcement to an NRAB award but went on to say that even if there had been a violation of the agreement, inasmuch as the measure of damages in these cases "is the amount he would have earned under the contract less such sums as he in fact earned * * * plaintiff Brimmer would not be entitled to his claim for he has suffered no damages * * *."

There is no question that we are here dealing with the "money award" part of the Board's decision. Under

the decisions of this Court the "money award" is subject to hearing *de novo* by the District Court on the merits. See *Gunther*. The Court had clear authority to grant summary judgment as to what, if any, money damages were due.

Since a judgment will be upheld on appeal if sustainable on any legal basis, even though the district court reached its result by assigning some different ground, the additional factor that these 16 petitioners had no unpaid wage losses and can recover nothing even under a valid award makes it clear beyond cavil that the judgment below should be affirmed. The Fourth Circuit has said "the practice in this court of considering grounds additional to those passed upon by the court below in support of the judgment and decree is too well settled to permit of discussion." *Knotts v. First Carolinas Joint Stock Land Bank*, 4 Cir., 86 F.2d 551 (1936).

As the Court of Appeals pointed out in its opinion upon consideration of the entire record, there is no error in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,
WILLIAM C. BEATTY
AMOS A. BOLEN
Attorneys for respondent
The Chesapeake and Ohio Railway Company, a Corporation

900 First Huntington National
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April 25, 1966

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APPENDIX

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MOTION FOR SUMMARY JUDGMENT

Respondent, The Chesapeake and Ohio Railway Company, a corporation, moves the Court pursuant to Rule 56, Federal Rules of Civil Procedure, to enter a summary judgment in its favor dismissing this action, on the ground that there is no genuine issue as to any material fact and Respondent is entitled to judgment as a matter of law.

This Motion is based upon:

(1) Award No. 9193 of the Third Division, National Railroad Adjustment Board, upon which this action is premised, is invalid, erroneous and unenforceable.

(2) The claims of Arthur Lee Masterson, Denver Bowman, Earl Scragg, Milford Maynard and C. B. Taylor have been fully satisfied and settled, wherefore they are barred of any recovery herein.

(3) The remaining eleven other petitioners herein were not adversely affected by displacement as a result of the reduction of work forces at the Respondent's Huntington Freight Station which was involved in setting Award No. 9193, wherefore they are not entitled to any recovery herein.

In support of this Motion the affidavit of C. E. Weaver, Jr., with exhibits thereto, is attached.

AFFIDAVIT

STATE OF WEST VIRGINIA
COUNTY OF CABELL, TO-WIT:

This day appeared before the undersigned authority C. E. Weaver, Jr., who after being duly sworn, deposes and says:

I am Assistant Vice-President—Labor Relations, of The Chesapeake and Ohio Railway Company; I make this affidavit in support of a Motion for Summary Judgment being filed by the Respondent in the case pending in the United States District Court for the Southern District of West Virginia styled Fletcher H. Hanson, et al., v. The Chesapeake and Ohio Railway Company, a corporation, Civil Action No. 1061; this action grows out of Award No. 9193 of the Third Division, National Railroad Adjustment Board; the Railway Company's participation before the N.R.A.B. in this matter was handled in my department, and I am familiar with the matters involved therein.

It has been the custom and practice through the years to adjust car lines and to change break-bulk points on less than carload package shipments at the sole discretion of railroad management and until after the consummation of the change which forms the basis for this litigation neither the railroad's employees nor the Union had claimed that such an exercise of managerial prerogative violates any portion of the company-union collective bargaining agreement, and it has become the custom and practice in the railroad industry and more particularly on the C&O that management could freely make such changes. The collective bargaining agreement allegedly applied in said Award No. 9193 had been in effect for many years without any change in any respect material to this controversy and throughout the years had always been interpreted

by the parties to said agreement as inapplicable to adjustments to car lines and changes in break-bulk points. For instance, the C&O removed such break-bulk transfer work from its Chicago, Illinois, Freight Station to Peru, Indiana, and then later to Cincinnati, Ohio, without any claim that it was impinging upon any labor rights of Chicago freight workers. On many other occasions there have been reductions or increases in freight worker forces by reason of a change in the billing of LCL way cars, but never before was a claim made by the union that such a change required negotiations.

Attached hereto and made a part hereof are:

(a) A printed copy of the record of N.R.A.B. Award No. 9193 setting forth the complete facts and positions of the company and union therein, as well as the opinion of the Board, and copies of the exhibits introduced before the Board which were not printed as a part of the record—all marked for identification here as "Weaver Exhibit A."

(b) Copy of agreement dated January 1, 1945, as supplemented, between The Chesapeake and Ohio Railway Company and all that class of clerical, office, station and store employes represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes effective January 1, 1945, No. 7, marked for identification here as "Weaver Exhibit B."

In my position I have been responsible for supervising the collation of employment records pertaining to the individual employees of the Railway Company who claim to have been affected by the matters dealt with in N.R.A.B. Award No. 9193. These records contain the following facts concerning the employees who

are petitioners in the above-mentioned Civil Action No. 1061:

When the position of Trucker C-38 was abolished on May 17, 1955, as a part of the reduction of work forces at the Railway Company's Huntington Freight Station, James H. Napier, who was the incumbent of that position, exercised his right of seniority and displaced a junior employee as Station Porter C-39; on May 23, 1955, Napier was duly dismissed from service pursuant to Board of Inquiry No. 10335. No appeal was taken by Napier from that disciplinary action, and his dismissal has become final. Napier suffered no loss of time by reason of the abolishing of the position Trucker C-38.

Harrison Bradshaw was not in active employment of the Railway Company in April-May-June, 1955, when the 23 positions complained of in Award No. 9193 were abolished at the Huntington Freight Station, Bradshaw having been displaced on November 16, 1953, from his position of Stower C-12. He was clasified as "cut off" from November 16, 1953, until September 27, 1955, at which time he exercised his seniority and accepted a vacant position; Bradshaw worked for the Railway Company thereafter when his seniority permitted until he was granted an annuity under the Railroad Retirement Act on June 3, 1960, thereby surrendering all his employment rights. Bradshaw was not ascertainably adversely affected by reason of the abolishing of positions at the Huntington Freight Station.

C. E. Cyrus held the position of Trucker C-46 from July 3, 1953 to June 17, 1955. His position was not affected by the abolishment of 23 positions involved in N.R.A.B. Award No. 9193; in point of seniority, Cyrus was senior to the incumbents of all Trucker positions which were abolished as a part of the reduction of forces by 23 men. Due to reduction in April-May, 1955 in the amount of Huntington less-than-car

load freight forwarded and received at the Huntington Freight Station, the position of Trucker C-46 was abolished June 17, 1955, and Cyrus took another position; Trucker C-46 was re-established August 8, 1955, and Cyrus took the job again; Trucker C-46 was again abolished January 4, 1956, and Cyrus took another position, continuing to work at some position with the Railway Company until January 2, 1959, when he was awarded an annuity under the Railroad Retirement Act, surrendering all employment rights with the Railway Company. The periodic abolishment of the position Trucker C-46 had nothing to do with the break-bulk or transfer shipments handled in Ashland, Kentucky, and involved in said Award No. 9193 but occurred by reason of fluctuation in the amount of freight received and forwarded for Huntington. These fluctuations occurred by reason of the amount of business carried on in Huntington and did not result from any corresponding changes at the Company's Ashland Freight Station, as may be seen from the following statistics:

Huntington, West Virginia

1955 Month	Tons Freight Forwarded	Tons Freight Received	Total
January	284	506	790
February	337	584	921
March	441	681	1122
April	460	590	1050
May	370	506	876
June	362	642	1004
July	400	650	1050
August	450	759	1209
September	431	747	1178
October	441	747	1188
November	349	704	1053
December	351	592	943

Ashland, Kentucky

1955 Month	Tons Freight Forwarded	Tons Freight Received	Total
January	134	308	442
February	107	314	421
March	131	398	529
April	124	340	464
May	207	317	524
June	165	361	526
July	166	360	526
August	191	442	633
September	181	405	586
October	211	417	628
November	184	441	625
December	153	322	475

C. E. Cyrus was not ascertainably adversely affected by the force reduction involved in N.R.A.B. Award No. 9193.

Okey O. Farley was "cut off" December 1, 1954, when displaced from the position of Trucker C-51 and remained in "cut off" status until August 21, 1959, when he resigned. Farley had no active employment with the Railway Company in 1955 when the 23 positions involved in N.R.A.B. Award No. 9193 were abolished at the Huntington Freight Station and was not ascertainably adversely affected by the matters dealt with in said Award.

Fletcher H. Hanson held the position of Check Clerk A-319 until he was displaced in April, 1955, by J. T. Frederick (who was the incumbent of Check Clerk A-170, one of the 23 positions abolished at the Huntington Freight Station, and who had more seniority than Hanson); Hanson on that date exercised his seniority to the position of Check Clerk A-146, Huntington. On April 26, 1955, Hanson was displaced from that position, and in turn he displaced another as

Swing-Clerk A-379, Huntington; May 14, 1955, Hanson was displaced from that position, and he in turn displaced another as Yard Clerk A-252, St. Albans, W. Va.; on August 29, 1955, Hanson was awarded the position of Seal and Check Clerk A-330, Huntington; from which he was displaced September 10, 1955, at which time he in turn displaced another on his old position as Yard Clerk A-252, St. Albans, W. Va. On October 10, 1955, Hanson was awarded Swing Clerk A-302, Huntington, and from that date until July 1, 1960, he held some position with the Railway Company in Huntington. All positions held by Hanson since April 19, 1955, paid an equal or higher rate than the position of Check Clerk A-319 from which he was displaced after the abolisment of 23 positions involved in N.R.A.B. Award No. 9193. Hanson suffered no loss of time nor decrease in wages by reason of the matters involved in said Award.

William H. Henderson was disqualified September 3, 1954, from Clerk A-160, office of Chief Train Dispatcher; Huntington, and was in the status of "cut off" until October 6, 1956, when he was awarded Swing Clerk A-362, Huntington; he held various positions such as Yard Clerk (teletype) A-424, Swing Ticket Seller A-293, Typist-Clerk A-228, Typist-Clerk in Personnel, Clerk-Typist in Pass Bureau, Car Movement Clerk, Machine Operator, and Wheelage Clerk in Car Records and Car Accounting, between October 6, 1955, and March 19, 1959, on which latter date he forfeited his seniority on the Huntington District Transportation Department Group 1 Roster. Henderson had no active employment with the Railway Company at the time of the abolishing of 23 positions at Huntington Freight Station and was not ascertainably adversely affected by the matters involved in N.R.A.B. Award No. 9193.

Elbert Keesee held no regular position in 1955 when 23 positions were abolished at the Railway Com-

pany's Huntington Freight Station, but was in the status of "cut off," his last position having been Trucker C-127, which was abolished November 5, 1953. On August 17, 1959, Keesee left the "cut off" status when he was awarded the position of Station Porter C-27, Charleston, and he intermittently has held a Station Porter, Charleston, position. Keesee was not ascertainably adversely affected by the matters involved in N.R.A.B. Award No. 9193.

Warren Mellert held the position of Station-Porter C-24 when that position was abolished March 18, 1954, and then held no regular position, but was classified as "cut off" until January 30, 1961, when he was awarded the position of Station Porter C-32. Mellert had no active employment with the Railway Company in 1955 when the 23 positions were abolished at the Huntington Freight Station which were involved in N.R.A.B. Award No. 9193 and Mellert was not ascertainably adversely affected by the matters dealt with in said Award.

Alderson W. Mills was displaced November 18, 1953, from the position of Station-Porter C-32 and held no regular position thereafter, being classified as "cut off" until he was granted an annuity under the Railroad Retirement Act, May 19, 1958, surrendering all employment rights with the Railway Company. Mills had no active employment with the Railway Company in 1955 when 23 positions were abolished at the Huntington Freight Station, and he was not ascertainably adversely affected by the matters involved in N.R.A.B. Award No. 9193.

Martin Prince was displaced April 4, 1954, from the position of Swing-Station-Porter C-68 and held no regular position thereafter, being classified as "cut off" up to July 1, 1960. Prince had no active employment with the Railway Company in 1955 when 23 positions were abolished at the Huntington Freight Station, and he was not ascertainably adversely af-

fected by the matters involved in N.R.A.B. Award No. 9193.

Oshel C. Scragg was classified as "cut off" from June 26, 1954, until granted a leave of absence July 25, 1955; on June 12, 1956, he was awarded the position of File Clerk A-129 and from that date until July 1, 1960, held various positions in various departments in Huntington as Time Keeper, Car Movement Clerk-Machine Operator, Mail and Ditto Machine Operator, and Key Punch Operator. Scragg had no active employment with the Railway Company in 1955 when 23 positions were abolished at the Huntington Freight Station, and he was not ascertainably adversely affected in the matters involved in N.R.A.B. Award No. 9193.

By a series of detailed memorandum agreements effective July 1, 1960, The Chesapeake and Ohio Railway Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes agreed upon job positions involved in the transfer of break-bulk work formerly billed to Huntington, West Virginia, and after June, 1955, billed to Ashland, Kentucky. These management-union agreements disposed of the situation covered by N.R.A.B. Award No. 9193 so that in reciting the above data regarding various employees we have not included any matters dating after July 1, 1960.

Although of the opinion that Award No. 9193 is erroneous and unenforceable, The Chesapeake and Ohio Railway Company by time check on the second half of August, 1960, payroll, prior to the institution of Civil Action No. 1061, as a means of seeking labor peace and in an attempt to avert litigation, paid those employees who were ascertainably adversely affected by the abolishing of 23 positions in its Huntington Freight Station in 1955. A total of 59 employees were found by careful and laborious study to have incurred losses totaling $59,104.95, and those persons

were paid that sum of money. The method of computation used was to take the 23 incumbents of the abolished positions and follow their work records to July 1, 1960, and pay them any difference from time lost or pay differential between what they actually earned and what they would have earned on the position they held prior to its abolishment. Since those 23 men "bumped" or displaced persons with junior seniority to them holding other positions, and those displaced persons in turn displaced other employees, every person who by such subsequent exercise of seniority was affected or furloughed was followed through to July 1, 1960, and paid any wage losses. This method of computation, which was felt to be a reasonable and liberal interpretation of the Adjustment Board's Award No. 9193, was discussed with the Brotherhood, and the General Chairman of that Brotherhood stated that his union would accept a settlement so made in full satisfaction of the Adjustment Board's Award No. 9193 and the Brotherhood has brought no litigation relating to that Award. The payments were made as aforesaid by the Railway Company in good faith believing then, as now, that by such payments it had fully abided by and complied with the Adjustment Board's Award. Included in the 59 employees with whom the Railway Company settled on the above-stated method of computation were:

(a) Arthur Lee Masterson, who was paid $19.70.

(b) Denver Bowman, who was paid the sum of $73.20.

(c) Earl Scragg, who was paid the sum of $539.82.

(d) Milford Maynard, who was paid the sum of $2,581.15.

(e) C. B. Taylor, who was paid the sum of $119.60.

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